TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1923

No. [redacted].79

WALDEMAR GNERICH AND JEREMIAH T. REGAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF B. & S. DRUG COMPANY, APPELLANTS,

vs.

S. F. RUTTER, AS PROHIBITION DIRECTOR IN AND FOR THE DISTRICT OF CALIFORNIA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JULY 14, 1922.

(29,033)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 483.

WALDEMAR GNERICH AND JEREMIAH T. REGAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF B. & S. DRUG COMPANY, APPELLANTS,

vs.

S. F. RUTTER, AS PROHIBITION DIRECTOR IN AND FOR THE DISTRICT OF CALIFORNIA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1922.

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

To Restrain Prohibition Director of the District of California from Restricting or Limiting the Amount of "Intoxicating Liquor" that may be Purchased and Used and Dispensed by Complainants as Pharmacists Under National Prohibition Act and Regulations Issued Thereunder.

Amended Bill of Complaint.

Plaintiffs bring this suit on behalf of themselves and at the request of Retail Druggists Association of San Francisco and Alameda County Pharmaceutical Association, voluntary unincorporated associations, on behalf of the members thereof and of all other druggists and pharmacists similarly situated and affected by the acts of defendant hereinafter set forth, and by leave of Court file this, their

amended bill of complaint, and for cause of action against defendant allege:

I.

Plaintiffs are both citizens of the United States of America and residents of the Southern Division of the Northern District of California, and are co-partners conducting a general drug or pharmaceutical business together at Number 27 Stockton Street in the city and county of San Francisco. Complainants are both pharmacists by profession, duly licensed as such under the laws of the State of California, and are engaged in the practice of pharmacy and of compounding medicinal preparations on physicians' prescriptions and in dispensing at retail various medicinal preparations at their aforesaid place of business. [1*]

II.

In the compounding of medicinal preparations or physicians' prescriptions and in manufacturing and compounding various preparations listed in the United States Pharmacopeia and the National Formulary, and of other preparations not so listed for sale in the ordinary course of complainants' business, large quantities of alcohol and other "intoxicating liquors," as that term is defined in Section 1 of Title II of the "National Prohibition Act," is now, and for a period of more than ten (10) years has been lawfully used by complainants. That the pharmacists profession and the correct and accurate compounding of medicinal preparations as hereinabove set forth, from time im-

*Page-number appearing at foot of page of original certified Transcript of Record.

memorial have been and they are now necessary and essential adjuncts to the medical profession and of the healing art. The number and amount of physicians' prescriptions presented to complainants to be compounded, and the amount of medicinal compounds, including "intoxicating liquors," purchased from complainants by the general public varies from time to time, depending upon the season of the year and upon the prevalence or absence of various diseases and epidemics in the community. Complainants are entitled to compound and fill and they do compound and fill all lawful physicians' prescriptions presented to them by the general public, and do bottle and sell to the public such other compounds and medicinal preparations hereinabove referred to as the demands of their business require, under such laws, rules and regulations of the United States and of the State of California as are, or as may from time to time be enacted and prescribed; complainants have at all times fully and fairly complied with all lawful acts, rules, regulations and ordinances, Federal, State and municipal, as appertain or relate to their said business and their profession [2] as pharmacists.

III.

That respondent is the duly appointed, qualified and acting "Prohibition Director" for the District of California, acting as such under the "Prohibition Commissioner" and the Commissioner of Internal Revenue of the Treasury Department of the United States; that respondent's powers and duties as such officer are such only as are prescribed by the

"National Prohibition Act" and such lawful rules and regulations as may be published by the Commissioner of Internal Revenue with the approval of the Treasury Department of the United States Government.

IV.

That heretofore and under date of January 16, 1920, the said Federal Prohibition Commissioner and the said Commissioner of Internal Revenue with the approval of the Secretary of the Treasury did publish "Regulations 60 Relative to the Manufacture, Sale, Barter, Transportation, Importation, Exportation, Delivery, Furnishing, Purchase, Possession and Use of Intoxicating Liquor under Title II of the National Prohibition Act of October 28, 1919, Providing for the Enforcement of the Eighteenth Amendment of the Constitution of the United States," which said rules and regulations have been and they now are in full force and effect. That it is the duty of said respondent, under said regulations, to enforce the said National Prohibition Act and the various provisions thereof within the District of the State of California.

V.

That heretofore and on the 29th day of September, 1920, in conformity with law and said regulations, complainants duly applied for and were granted by the Federal Prohibition [3] Commissioner at Washington, D. C., on the form prescribed by said regulations, a permit "to use and sell Intoxicating Liquors for other than beverage purposes," in the following particulars, to wit:

1. In the manufacture of United States Pharmacopeia and National Formulary preparations unfit for use as a beverage.

2. In selling in quantities not exceeding one pint, to persons not holding permits to purchase when medicated according to any one of the seven formulae set forth in section 61 of the aforesaid regulations prescribed by said Treasury Department.

3. In compounding medicinal preparations on physicians' prescriptions or otherwise medicated according to the standard set forth in paragraph "A" Section 60 of the aforesaid regulations, prescribed by said Treasury Department, and put up in advance of order for sale, and in quantities not exceeding five gallons in a period of ninety days.

4. In selling retail as such, to others holding permits which confer authority to purchase and use intoxicating liquors for nonbeverage purposes.

5. In dispensing as such on physicians' prescriptions given on Form 1403 prescribed by the Treasury Department of the United States Internal Revenue, in quantities not exceeding one pint in ten days to the same person, and for nonbeverage purposes.

VI.

That complainants were required by said regulations to set forth, and they did set forth in their application for said permit, that the kind and the probable maximum quantity of "intoxicating liquors" that they desired to sell or use in their said business during any quarterly period, would be

two hundred [4] and eighty-three proof gallons of alcohol, one hundred and fifty-seven proof gallons of whiskey, and five gallons of wine and four and one-half proof gallons of brandy; that said application was duly verified by your petitioners and was accompanied by a bond in the form and amount required by said regulations to cover the maximum quantities of intoxicating liquors set forth in said application as desired to be used or sold by them, a copy of which said application is hereto annexed, marked Exhibit "A" and made a part hereof.

VII.

That under date of November 26, 1920, said Prohibition Commissioner issued to your petitioners herein a permit under the National Prohibition Act and regulations issued thereunder, authorizing and permitting your petitioners to use and sell intoxicating liquors for other than beverage purposes, in conformity with said application, but arbitrarily and without authority of law or regulation, inserted in said permit the restriction that "this permit is issued for one hundred gallons of distilled spirits and five gallons of wine" for each quarterly period, a copy of which said permit is likewise annexed hereto and made a part hereof and marked Exhibit "B."

VIII.

That said permit has never been set aside or revoked and the same is still in full force and effect.

IX.

Under the authority of the aforesaid permit so

granted to complainants, under date of February 17, 1921, your petitioners made application to the defendant as said Federal Prohibition Director on the form and in the manner prescribed by the aforesaid Regulations of the Treasury Department, for a [5] permit to purchase one barrel of grain alcohol for the uses and purposes set forth in the permit heretofore issued to complainants hereinabove referred to; that on the 2d day of March, 1921, said application for permit to purchase was returned to complainants by said Federal Prohibition Director, disapproved, for the reason that the purchase of said barrel of alcohol by complainants would allow complainants to withdraw in excess of one hundred gallons of "distilled spirits" per quarter, as more fully appears from a letter from respondent to complainants dated March 2d, 1921, a copy of which letter is hereto attached, made a part hereof and marked Exhibit "C"; that numerous other applications for permits to purchase alcohol and "intoxicating liquors" have been made by your complainants to said respondent and have been likewise disapproved on the ground that your complainants have exceeded the amount of "distilled spirits" permitted by them to be dispensed under the aforesaid permit issued to them under the National Prohibition Act.

X.

That because of said action of said respondent complainants have been greatly injured in their said business of pharmacists and have been prevented, and are now being prevented, from lawfully

pursuing their business of manufacturing and compounding the aforesaid preparations and in using, dispensing and selling the aforesaid alcohol and "intoxicating liquors" for other than beverage purposes; that said injury to complainants' business will continue to their great and irreparable damage unless said respondent, in approving the applications of your complainants for permits to purchase said alcohol and "intoxicating liquor," be restrained and enjoined by this Honorable Court from limiting the amount to be purchased and used by complainants [6] to quantities not exceeding one hundred gallons of distilled spirits per quarterly period.

XI.

That the restriction so fixed in said permit by said Commissioner is arbitrary, unlawful, unreasonable and void, as constituting an unwarranted usurpation of legislative powers by an administrative officer of the executive department of the government of the United States, and as an attempt by said official to invalidate and repeal those portions of the National Prohibition Act which recognize and permit the lawful use of "Intoxicating Liquor" for medicinal and nonbeverage purposes; and as a violation of the rights, privileges and duties conferred upon complainants as pharmacists under the provisions of said act. That said restriction is not necessary to the enforcement of any of the provisions of the National Prohibition Act, nor is it authorized by said act or by any rule or regulation published by the authority thereof, and is an un-

necessary, useless, arbitrary, harmful and unlawful restraint and burden placed upon the profession and the business of complainants and others similarly situated.

XII.

Before the filing of this bill of complaint, plaintiffs duly requested said Prohibition Director to disregard and ignore the aforesaid restriction purporting to be contained in said permit, but said official refused and threatens to continue in his attempts to enforce said restriction; that complainants have no remedy at law and bring this bill in equity to restrain defendant's threatened continued interference with plaintiffs in their business as pharmacists and druggists, and to compel him to ignore and disregard said purported limitation, in issuing to [7] plaintiffs permits to purchase "intoxicating liquor" under their aforesaid permit to use and sell "intoxicating liquor" for nonbeverage purposes.

XIII.

That because of the said arbitrary, unreasonable and unlawful and void action and restriction of said Commissioner in limiting the amount of alcohol and intoxicating liquors that can be purchased and dispensed by complainants, they have been prevented from filling many prescriptions lawfully and regularly issued by licensed physicians resident of the Southern Division of the Northern District of California, and issued by said physicians under permits on the form and in the manner required by law; furthermore, complainants have been pre-

vented from purchasing alcohol and spirituous liquors in such quantity or quantities as to them would be advantageous, and have been compelled to purchase said alcohol and said spirituous liquors in small quantities, and have been forced thereby to pay exorbitant prices therefor, all to their future great and irreparable injury.

XIV.

This suit is one arising under the laws of the United States and where no plain, adequate and complete remedy may be had by plaintiffs at law, and is brought by them to avoid a multiplicity of judicial proceedings.

WHEREFORE, complainants pray that a day be fixed by this Honorable Court for the hearing of this complaint; that a writ of subpoena issue out of and under the seal of this Honorable Court directing and requiring respondent to appear herein; that said respondent be cited to be and appear before this Honorable [8] Court at a time and place to be fixed by order of this Court and then and there show cause, if any he may have, why said purported limit so fixed in plaintiffs' permit should not be by him disregarded pending the final hearing and determination of this cause, and why all lawful applications filed by complainants and others similarly situated, to purchase alcohol and spirituous liquors in such quantity or quantities as to them may be most advantageous to their businesses as pharmacists, should not be approved; that at said hearing such other proper orders or decrees be made as may to this Honorable Court seem meet

and proper in the premises; that upon the final hearing hereof a judgment and decree of this court be rendered perpetually restraining and enjoining said respondent from enforcing as against complainants such, or any, restriction upon the amount of spirituous liquors that may be lawfully dispensed by them. Complainants pray general relief.

HARRY G. McKANNAY,
Solicitor for Complainants. [9]

State of California,
City and County of San Francisco,—ss.

Waldemar Gnerich, being first duly sworn, deposes and says:

That he is one of the complainants named in the foregoing amended bill of complaint; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information or belief and as to those matters that he believes it to be true.

WALDEMAR GNERICH.

Subscribed and sworn to before me this 21st day of April, 1921.

[Notarial Seal] J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California. [10]

Exhibit "A."

Treasury Department,
U. S. Internal Revenue,
Form No. 1404.

Serial No. of Permit
Calif. 1856.

Penal Sum of Bond—$1000.
Date of Bond—Sept. 29, 1920.

APPLICATION FOR PERMIT UNDER THE NATIONAL PROHIBITION ACT.

(Instructions on Reverse Side.)

September 29, 1920.

Federal Prohibition Commissioner,
Washington, D. C.

The undersigned, B. & S. Drug Co., Waldemar Gnerich, Jeremiah T. Regan, of 27 Stockton Street, San Francisco, California, co-partners engaged in the business or profession of Retail Druggists, hereby makes application for a permit to use and sell intoxicating liquor for other than beverage purposes, to wit:

1. In the manufacture of U. S. P. and N. F. preparations unfit for use as a beverage

2. In selling in quantities not exceeding one pint to persons not holding permits to purchase when medicated according to any one of seven formulae set forth in Sec. 61, Reg. 60.

3. In compounding medicinal preparations on physician's prescription or otherwise, medicated according to the standards set forth in Par. A, Sec. 60, Reg. 60, not put up in advance of order for sale, and in quantities not exceeding five gallons in a period of ninety days.

4. In selling retail as such to others holding permits, which confer authority to purchase and use intoxicating liquor for non-beverage purposes.

5. In dispensing as such on physician's prescriptions given on Form 1403 in quantities not exceeding one pint in ten days to some person and for nonbeverage purposes.

All sales of intoxicating liquors to be made through registered pharmacists Gnerich Weldmar and J. Regan.

The probable quantity that will be received or on hand during any quarterly period will be 283 proof gallons of alcohol; 157 proof gallons of whiskey; 5 wine gallons of wine; 5 proof gal. brandy.

$2,000 bond covering this application, dated Sept. 29, filed with U. S. Government.

It is hereby certified that the undersigned has not within one year prior to the date hereof violated the terms of any permit issued under the National Prohibition Act or any law of the United States or of any State regulating traffic in liquor, and will observe the terms of any permit issued pursuant to this application and the provisions of all laws and regulations relative to the acts for which permit is issued.

B. & S. DRUG CO.,
By WALDEMAR GNERICH,
Copartner.

Recommended for Approval,
E. C. YELLOWLEY,
Acting Prohibition Director at San Francisco, Cal.

Subscribed and sworn to before me this 29th day of Sept., 1920.

[Notarial Seal] HUGH T. SIME. [11]

Exhibit "B."

Treasury Department, Serial No. Calif. 1856.
United States Internal Revenue.
Form 1405.

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER.

Pro. Permit
29–44141

Penal Sum of Bond—$2000
Dated—Sept. 29th, 1920.

Office of Federal Prohibition Commissioner,
Washington, D. C.

To B. & S. DRUG CO. (Waldemar Gnerich & Jeremiah T. Regan), 27 Stockton St., San Francisco, Calif.

Application having been duly presented and approved, you are hereby authorized and permitted to use and sell intoxicating liquor for other than beverage purposes, to wit:

In the manufacture of U. S. P. and N. F. preparations unfit for use as a beverage.

In selling in quantities not exceeding one pint to persons, not holding permits to purchase when medicated according to any one of the seven formulae set forth in Sec. 61, Reg. 60.

In compounding medicinal preparations on physician's prescription or otherwise, medicated accord-

ing to the standards set forth in Par. A, Sec. 60, Reg. 60, not put up in advance of orders for sale, and in quantities not exceeding 5 gallons in a period of ninety days.

In selling retail as such to others holding permits, which confer authority to purchase and use intoxicating liquor for non-beverage purposes.

In dispensing as such on a physcian's prescription given on form 1403 in quantities not exceeding one pint in ten days to same person, and for non-beverage purposes.

This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period.

In the manufacture of the preparations listed on application dated Oct. 2d,1920, and marked approved by this office.

This permit is effective from the date hereof, and will remain in force until December 31, 1921, unless revoked or renewed as provided by law or regulations.

This permit is granted under the conditions that the provisions of National Prohibition Act and Regulations issued thereunder will be strictly observed.

Dated this Nov. 26, 1920 *day of* ———, 192—.

K. J. JOHN F. KRAMER,
Prohibition Commissioner. [12]

Exhibit "C."

TREASURY DEPARTMENT,
Internal Revenue Service,
San Francisco, Calif.

Calif. 1-856

Office of
Federal Prohibition Director,
California.

March 2, 1921.

Pro-QJB.
B. & S. Drug Company,
27 Stockton Street,
San Francisco, California.

Sirs:

The records of this office indicate that you are authorized to withdraw 100 gallons of distilled spirits per quarterly period. As you have already withdrawn for this quarter approximately 90 gallons, your application for one barrel grain alcohol is returned herewith disapproved. Your application for a quantity not to exceed 10 gallons would be favorably considered.

Respectively,
E. C. YELLOWLEY,
Acting Prohibition Director.

[Endorsed]: Receipt of a copy of the within Amended Complaint admitted this 21st day of April, 1921.

U. S. DISTRICT ATTORNEY,
Attorney for Defendant.

Filed April 21, 1921. Walter B. Maling, Clerk.
[13]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

Order to Show Cause.

In accordance with the prayer of the complaint on file herein, it is hereby ordered that the defendant be and appear before this court on Monday, the 18th day of April, 1921, at the hour of ten o'clock A. M. of said day, and then and there show cause, if any he may have, why, pending the final hearing and determination of this suit, he should not be restrained and enjoined from limiting or enforcing any limit that may be fixed by him upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act used or to be used by plaintiffs as duly licensed pharmacists, and all others similarly situated in their business of compounding and dispensing prepartions authorized to be compounded

and dispensed by licensed pharmacists in and by said National Prohibition Act.

It is also ordered that a copy of said bill of complaint and of this order be served on the defendant.

Dated: April 9th, 1921.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: Filed Apr. 9, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

No.——

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

Notice of Motion to Dismiss.

To the Complainants Above Named, and to Harry G. McKannay, Their Attorney:

Notice is hereby given you and each of you that the defendant above named, on Monday, April 18, 1921, at 10 o'clock A. M., or as soon thereafter as

counsel can be heard, will move the above-entitled court for an order dismissing complainants' bill of complaint.

Said motion will be made upon the grounds set out in the defendant's written motion to dismiss now on file, and will be based upon all the records and papers on file herein, and upon this notice.

Dated this 12th day of April, 1921.

FRANK M. SILVA,
United States Attorney,
WILFORD H. TULLY,
Asst. United States Attorney,
Attorneys for Defendant. [15]

[Endorsed]: Service of the above motion to dismiss is admitted this 12th day of April, 1921.

HARRY G. McKANNAY,
Atty. for the Plaintiffs.

Filed Apr. 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy. [16]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

No. 603.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Complainants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

Decree.

In the above-entitled suit, complainants' application for an injunction *pendente lite,* based upon the amended complaint on file herein, and defendant's motion to dismiss said bill, came on this day regularly to be heard; said application and motion were argued by counsel for the respective parties, Harry G. McKannay, Esq., appearing as counsel for the complainants and Wilford H. Tully, Esq., Assistant United States Attorney, appearing for defendant, and said application and motion were submitted to the Court for its decision, and thereupon consideration thereof, it was by the Court ORDERED, ADJUDGED AND DECREED as follows, to wit:

That the said application be and the same is hereby denied, and the said motion of defendant to dismiss

said bill of complaint be and the same is hereby granted, and the said bill is hereby dismissed upon the ground that it does not state facts sufficient to constitute a cause of action against said defendant as acting Prohibition Director in and for the District of California.

Done in open court this 2d day of May, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed and entered May 3, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

No. 603—IN EQUITY.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Complainants and Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Commissioner in and for the District of California,

Defendant and Respondent.

Assignment of Errors.

Now come Waldemar Gnerich and Jeremiah T. Regan, citizens of the United States of America and

residents of the Southern Division of the Northern District of California, copartners doing business under the firm name and style of B. & S. Drug Company, and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the above-entitled United States District Court made and entered herein on the 2d day of May, 1921, wherein and whereby it was ordered, adjudged and decreed that the prayer of complainants' bill of complaint be denied and that said bill be dismissed, and said complainants and appellants file the following assignment of errors upon which they will rely upon the prosecution of their appeal herein, and do hereby assign that the above-entitled United States District Court erred in the following particulars, to wit:

I.

The said District Court erred in granting the motion of [18] the defendant to dismiss complainants' bill of complaint on the ground that said bill did not present a cause of action in equity under the Constitution and laws of the United States.

II.

The said District Court erred in granting the motion of the defendant to dismiss complainants' bill of complaint on the ground that the facts alleged in the bill of complaint are insufficient to state a cause of action in equity.

III.

The said District Court erred in holding and deciding that said Honorable Court had no jurisdiction over the subject matter of said cause or to grant the

relief therein prayed for or any part thereof.

IV.

The said District Court erred in holding and deciding that defendant did not exceed the power conferred upon him by law, and did not act without his jurisdiction, in enforcing against complainants the purported limitation contained in the permit of appellants to purchase, use and dispense "intoxicating liquors," as said term is defined in the National Prohibition Act, for other than beverage purposes.

V.

The said District Court erred in holding and deciding that the said purported limitation on the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which complainants could purchase, use and dispense in their business as pharmacists, as set forth in said permit, was not null and void and of no force or effect, and was within the jurisdiction of the "Prohibition Commissioner" at Washington to make and within the jurisdiction of the respondent to enforce. [19]

VI.

The said District Court erred in holding and deciding that the "Prohibition Commissioner" had the power to make and enforce as a rule or regulation of the Treasury Department of the United States, a limitation placed by him upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that could be purchased, used and dispensed by the complainants in their business as pharmacists under the terms of said National Prohibition Act, without having such limi-

tation of his authority to make the same first authorized and published under and by the rules and regulations authorized by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury of the United States.

VII.

The said District Court erred in holding and deciding that the National Prohibition Commissioner has the power to make and enforce any limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, other than or different from the limitation or restriction contained and expressed in the Eighteenth Amendment to the Constitution of the United States, the National Prohibition Act itself, or the Rules and Regulations duly published under the authority thereof.

VIII.

The said District Court erred in holding and deciding that the "National Prohibition Commissioner" has authority and jurisdiction to make and enforce a limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which could be purchased, used and dispensed by the complainants in their business as pharmacists, other than or different from that prescribed, fixed or determined by the amount [20] of the bond furnished by complainants under the provisions of paragraph "A," Section 60 of "Regulations 60 Relative to the Manufacture, Sale, Barter, Transportation, Importation, Exportation, Delivery, Furnishing, Purchase, Possession and Use of Intoxi-

cating Liquor under Title II of the National Prohibition Act of October 28, 1919, Providing for the Enforcement of the Eighteenth Amendment of the Constitution of the United States."

IX.

The said District Court erred in holding and deciding that the defendant had authority and that it was his duty and within his jurisdiction, to enforce as a lawful Regulation of the Treasury Department of the United States, the personal opinion, wish or desire of the "Prohibition Commissioner" to restrict the amount of "intoxicating liquor" as that term is defined in the National Prohibition Act, that could be purchased, used and dispensed by complainants in their business as pharmacists, without said personal opinion, wish or desire of said Prohibition Commissioner being first approved by the Commissioner of Internal Revenue and the Secretary of the Treasury of the United States, and published as a uniform Rule and Regulation of the Treasury Department, to be followed in enforcing the provisions of said National Prohibition Act.

WHEREFORE, appellants, Waldemar Gnerich and Jeremiah T. Regan, copartners doing business under the firm name and style of B. & S. Drug Company, pray that the said decree may be reversed, and that said District Court for the Southern Division of the Northern District of California be directed to enter its order, judgment and decree perpetually restraining and enjoining said respondent, E. C. Yellowley, or his successor in office, as acting Prohibition [21] Director of the District

of California, from enforcing as against complainants and appellants and others similarly situated, the restriction or limitation hereinabove set forth or referred to, or any restriction or limitation, upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that may be lawfully purchased, used and dispensed by them *if* their businesses as pharmacists, or any limitation or restriction other or different than those set forth and proclaimed in the Eighteenth Amendment to the Constitution of the United States, the National Prohibition Act, and the Rules and Regulations of the Treasury Department of the United States duly published thereunder in the manner required thereby.

Dated this 23d day of May, 1921.

HARRY G. McKANNAY,
Solicitor for Complainants and Appellants.

[Endorsed]: Receipt of a copy of the within assignment of errors admitted this 24th day of May, 1921.

FRANK M. SILVA,
U. S. Attorney.

Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division

EQ. 603.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. &. S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

Petition for Appeal (and Order Allowing Appeal).

To the Honorable WILLIAM C. VAN FLEET, District Judge, etc.:

The above-named plaintiffs feeling themselves aggrieved by the decree made and entered in this cause on the 2d day of May, 1921, do hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and pray that their appeal be allowed, and that citation issue as provided by law, and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the Southern Division of the Northern District of California.

Dated May 9th, 1921.

HARRY G. McKANNAY,
Solicitor for Complainants and Appellants.

Ordered appeal allowed and cost bond fixed in the sum of Three Hundred Dollars.

WM. C. VAN FLEET,
Judge.

May 24th, 1921. [23]

[Endorsed]: Receipt of a copy of the within petition for appeal admitted this 24th day of May, 1921.

FRANK M. SILVA,
United States Attorney.

Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Waldemar Gnerich and Jeremiah T. Regan, as principals, and Globe Indemnity Company, as surety, are held and firmly bound unto E. C. Yellowley, as acting Prohibition Director in and for the District of California, in the full and just sum of Three Hundred (300) Dollars, to be paid to the said E. C. Yellowley, as acting Prohibition Director aforesaid, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of

May, in the year of our Lord one thousand nine hundred and twenty-one (1921).

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California, in a suit depending in said court, between Waldemar Gnerich and Jeremiah T. Regan, Copartners Doing Business Under the Firm Name and Style of B. & S. Drug Company, Complainants, vs. E. C. Yellowley, as Acting Prohibition Director in and for the District of California, Defendant, a decree was rendered against the said complainants, and the said complainants, having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree in the aforesaid suit, and a citation directed to the said E. C. Yellowley, as acting Prohibition Director in and for the District of California, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said complainants and appellants shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WALDEMAR GNERICH.
JEREMIAH T. REGAN. (Seal)
GLOBE INDEMNITY COMPANY. (Seal)
By JOHN H. ROBERTSON,
Agent and Attorney in Fact.

Acknowledged before me the day and year first above written.

S. M. PALMER.

[Endorsed]: Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,
Judge.

Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 603.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

Praecipe for Transcript of Record on Appeal.

To Walter B. Maling, Clerk of the Above-entitled Court:

Please prepare and duly authenticate for the appeal of the plaintiffs, Waldemar Gnerich and Jeremiah T. Regan, copartners doing business under

the firm name and style of B. & S. Drug Company, to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered in the above-entitled cause May 2d, 1921, a transcript incorporating the following portions of the record therein, and none other:

1. Amended bill of complaint.
2. Order to show cause.
3. Subpoena ad respondendum.
4. Notice of motion to dismiss appeal.
5. Decree.
6. Assignment of errors.
7. Petition for appeal and order granting appeal.
8. Bond on appeal.
9. Citation on appeal.
10. Praecipe for transcript of record on appeal.
11. Certificate of Clerk U. S. District Court to transcript on appeal.

Dated, June 15th, 1921.

HARRY G. McKANNAY,
Solicitor for Plaintiffs and Appellants. [26]

[Endorsed]: Receipt of a copy of the within praecipe admitted this 18th day of June, 1921.

For the U. S. District Attorney,
FRANK M. SILVA,
MERVIN C. LERNHART.

Filed Jun. 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

No. 603.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing twenty-eight pages, numbered from 1 to 28, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript on appeal, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $11.70; that said amount was paid by Harry G. McKannay, attorney for plaintiffs; and that the original citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of June, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [28]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to E. C. Yellowley, as Acting Prohibition Director in and for the District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Southern Division of the Northern District of California, wherein Waldemar Gnerich and Jeremiah T. Regan, copartners doing business under the firm name and style of B. & S. Drug Company are appellants, and you, the said E. C. Yellowley, as acting Prohibition Director in and for the District of California, are respondent, and appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said order allowing appeal mentioned, should not be corrected, and why speedy

justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 24th day of May, A. D. 1921.

WM. C. VAN FLEET,
United States District Judge. [29]

United States of America,—ss.

On this 24th day of May, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared before me, John G. Weir, the subscriber, and makes oath that he delivered a true copy of the within citation to Frank M. Silva, United States Attorney for the Northern District of California.

JOHN G. WEIR.

Subscribed and sworn to before me at San Francisco, this 24th day of May, A. D. 1921.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: No. 603. United States District Court for the Southern Division of the Northern District of California, Second Division. Waldemar Gnerich, et al., etc., Appellant, vs. E. C. Yellowley, etc. Citation on Appeal. Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3706. United States Circuit Court of Appeals for the Ninth Circuit. Waldemar Gnerich and Jeremiah T. Regan, Copartners Doing Business Under the Firm Name and Style of B. & S. Drug Company, Appellants, vs. E. C. Yellowley, as Acting Prohibition Director in and for the District of California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed June 27, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 603.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs and Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant and Appellee.

Order Extending Time to and Including July 22, 1921, to File Record and Docket Cause.

Upon motion of Harry G. McKannay, Esquire, solicitor for the above-named plaintiffs and appellants, and good cause appearing therefor:

IT IS ORDERED that the clerk of the above-entitled court may have and he is hereby given, up to and including the 22d day of July, 1921, within which to prepare, authenticate and certify to the United States Circuit Court of Appeals for the Ninth Circuit, the transcript of record on appeal in the above-entitled cause.

Dated June 18th, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 3706. United States Circuit Court of Appeals for the Ninth Circuit. Waldemar Gnerich, et al., etc., Plaintiffs and Appellants, vs. E. C. Yellowley, as Acting Prohibition Director, etc., Defendant and Appellee. Order Extending Time of Clerk to File Record on Appeal. Filed Jun. 18, 1921. F. D. Monckton, Clerk. Refiled Jun. 27, 1921. F. D. Monckton, Clerk.

No. 3706

United States

Circuit Court of Appeals

For the Ninth Circuit.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for the District of California,

Appellee.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-first day of October, in the year of our Lord one thousand nine hundred and twenty-one. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Order of Submission.

ORDERED appeal in the above-entitled cause argued by Mr. Harry G. McKannay, counsel for the appellants, and by Mr. Thomas J. Sheridan, Assistant United States Attorney and counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the appellee to file brief to-day; counsel for appellants to reply

thereto fifteen (15) days from date; further ordered leave granted Mr. Theodore Bell to file brief as *amicus curiae* within fifteen days; counsel for appellee granted leave to reply to said brief within fifteen days, and with leave to counsel for the appellants to reply to reply brief of appellee, if so advised.

At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the Ninth day of January, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * Walde-

mar Gnerich and Jeremiah T. Regan, Copartners Doing Business Under the Firm Name and Style of B. & S. Drug Company, vs. E. Forrest Mitchell, Substituted in the Place and Stead of E. C. Yellowley, as Acting Prohibition Director in and for the District of California, Appellee. No. 3706.
* * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Stipulation and Order Substituting E. Forrest Mitchell for E. C. Yellowley, as Acting Prohibition Director, etc.

WHEREAS, since the filing of the complaint for injunction in the above-entitled matter in the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division, and the perfecting of the appeal herein, defendant in error, E. C. Yellowley, has resigned his office as Acting Prohibition Director in and for the District of California, and E.

Forrest Mitchell has been duly appointed to such office and is now the duly qualified and acting Prohibition Director in and for the District of California,—

IT IS THEREFORE STIPULATED that the said E. Forrest Mitchell may be, and is, hereby substituted as defendant in error in the above-entitled matter and in all proceedings to be hereafter had and taken in the matter of this appeal in the place and stead of E. C. Yellowley, reserving on the part of the defendant in error and said Mitchell all objections that are or could have been made originally by said E. C. Yellowley as to said action or that it was or was not lawfully commenced as against him.

Dated: December 3, 1921.

HARRY G. McKANNAY,
K. J.
Attorney for Plaintiff in Error.
JOHN T. WILLIAMS,
United States Attorney.
T. J. SHERIDAN,
Asst. United States Attorney.

_____,
Attorneys for Defendant in Error.

Dated: San Francisco, Calif., December 3, 1921.

So ordered.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: Stipulation and Order Substituting E. Forrest Mitchell for E. C. Yellowley, as Acting

Prohibition Director, etc. Filed December 3, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Opinion U. S. Circuit Court of Appeals.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Before GILBERT, ROSS and MORROW, Circuit Judges.

ROSS, Circuit Judge:

An addition to the Constitution of the United States made by the adoption of the Eighteenth Amendment prohibits the manufacture, sale, or transportation of intoxicating liquors for beverage purposes within the United States and all territory subject to the jurisdiction thereof, and also the im-

portation thereof into or the exportation thereof from the United States and all territories subject to its jurisdiction, and further declares that the Congress and the several States shall have concurrent power to enforce those provisions by appropriate legislation.

Acting under and in pursuance of the power thus conferred upon it by the Constitution, Congress passed, on October 28th, 1919, an act entitled "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and all other lawful industries." 41 Stat. 305.

The decree appealed from dismissed a bill of complaint filed by the appellant Drug Company, on the ground that it did not state facts sufficient to constitute a cause of action against the defendant as Acting Prohibition Director in and for the District of California. After setting forth the jurisdictional facts and the nature of the appellant's business, and the appointment and qualification of the defendant Prohibition Director, the bill alleges that on January 16, 1920, the Federal Prohibition Commissioner and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, published "Regulations 60 Relative to the Manufacture, Sale, Barter, Transportation, Importation, Exportation, Delivery, Furnishing, Purchase, Possession and Use of In-

toxicating Liquor under Title II of the National Prohibition Act of October 28, 1919, Providing for the Enforcement of the Eighteenth Amendment of the Constitution of the United States," which rules and regulations are still in effect, and that pursuant thereto the complainants on the 29th day of September, 1920, applied for and were granted by the Federal Prohibition Commissioner at Washington, on the form prescribed by the regulations, a permit "to use and sell intoxicating liquors for other than beverage purposes," in the following particulars, to wit:

"1. In the manufacture of United States Pharmacopeia and National Formulary preparations unfit for use as a beverage.

"2. In selling in quantities not exceeding one pint, to persons not holding permits to purchase when medicated according to any one of the seven formulae set forth in section 61 of the aforesaid regulations prescribed by said Treasury Department.

"3. In compounding medicinal preparations on physicians' prescriptions or otherwise medicated according to the standard set forth in paragraph 'A' Section 60 of the aforesaid regulations, prescribed by said Treasury Department, and put up in advance of order for sale, and in quantities not exceeding five gallons in a period of ninety days.

"4. In selling retail as such, to others holding permits which confer authority to purchase

and use intoxicating liquors for nonbeverage purposes.

"5. In dispensing as such on physicians' prescriptions given on Form 1403 prescribed by the Treasury Department of the United States Internal Revenue, in quantities not exceeding one pint in ten days to the same person, and for nonbeverage purposes."

The bill further alleges that the complainants were required by the regulations to set forth, and in their application for the permit did set forth, that the kind and the probable maximum quantity of "intoxicating liquors" that they desired to sell or use in their business during any quarterly period would be 283 proof gallons of alcohol, 157 proof gallons of whiskey, and 5 gallons of wine and four and one-half proof gallons of brandy; that their said application was duly verified and was accompanied by a bond in the form and amount required by the regulations to cover the maximum quantities of intoxicating liquors set forth in the application as desired to be used or sold by them, a copy of which application was annexed to and made a part of the bill. The bill alleges that under date November 26, 1920, the Prohibition Commissioner at Washington issued to the complainants a permit under and in pursuance of the National Prohibition Act authorizing and permitting them to use and sell intoxicating liquors for other than beverage purposes, in conformity with their said application, "but arbitrarily and without authority of law or regulation, inserted in said permit the restriction

that 'this permit is issued for one hundred gallons of distilled spirits and five gallons of wine' for each quarterly period," which permit is also annexed to and made a part of the bill.

The bill alleges that the said permit has not been revoked, and that by virtue of it the complainants, on February 17, 1921, made application to the defendant as Prohibition Director for the District of California, on the form and in the manner prescribed by the regulations of the Treasury Department, for a permit to purchase one barrel of grain alcohol for the uses set forth in the permit, which application was on the 2d of March, 1921, returned to the complainants by the defendant, for the reason that the purchase of the said barrel of alcohol would allow the complainants to withdraw in excess on one hundred gallons of distilled spirits per quarter, as more fully appears from his letter, a copy of which is annexed to and made a part of the bill; that numerous other similar applications of the complainants for permits to purchase alcohol and intoxicating liquors had been likewise disapproved by the defendant upon like grounds, all of which refusals it is alleged have resulted in great injury to the complainants in their business of pharmacists, and have prevented them from lawfully purchasing such business in using, dispensing, and selling such alcohol and intoxicating liquors for other than beverage purposes, to their great and irreparable damage.

The bill alleges that the restriction so fixed by the Commissioner in the said permit "is arbitrary, un-

lawful, unreasonable, and void as constituting an unwarranted usurpation of legislative powers by an administrative officer of the executive department of the Government of the United States, and is an attempt by said official to invalidate and repeal those portions of the National Prohibition Act which recognize and permit the lawful use of 'intoxicating liquor' for medicinal and non-beverage purposes; and is a violation of the rights, privileges, and duties conferred upon complainants as pharmacists, under the provisions of said act"; that the said restriction is not necessary to the enforcement of any of the provisions of that act, nor is it authorized by any rule or regulation published by the authority thereof; that because of the said restriction the complainants have been prevented from filling many prescriptions lawfully issued by licensed physicians resident in the Southern Division of the Northern District of California, and issued by them under permits on the form and in the manner prescribed by law.

The prayer of the bill was that the defendant to it show cause why the limit so fixed in the permit issued to complainants should not by him be disregarded pending the final hearing and determination of the cause, and that upon final hearing the defendant be perpetually restrained from enforcing as against the complainants the restrictions complained of.

The constitutional amendment imposes no prohibition upon either the manufacture, sale, or transportation of intoxicating liquor for non-beverage

purposes, nor does it undertake in any way to define what shall constitute intoxicating liquor, but Congress did the latter in its National Prohibition Act, and also enacted numerous most stringent provisions for the giving effect to the constitutional amendment, and in the endeavor to prevent its evasion.

Section 1 of Title II of the act defines the meaning of the words "person," "commissioner," "application," "permit," "bond," as used therein, and by the 7th subdivision of that section declares:

> "The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records."

Section 4 enumerates various articles therein declared not subject to the provisions of the Act if they correspond with certain specified descriptions and limitations, in which event the commissioner is authorized to issue a permit for their sale. By Section 5, however, it is provided that whenever the commissioner has reason to believe that any of such articles do not correspond with the descriptions and limitations specified in Section 4, he shall make an

investigation upon prescribed notice, and in the event that the manufacturer of such an article fails to show to his satisfaction that the article corresponds to the descriptions and limitations provided in Section 4, his permit shall be revoked. And that section concludes with the provision that "The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the Court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article."

By section 6 it is declared, among other things, that no one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as therein provided. The life of such permits is prescribed, and it is declared that they shall specify the quantity and kind of liquor to be purchased, and the purpose for which it is to be used, power being given the commissioner to prescribe the form of all such permits and of the applications therefor, and to require bond in such form and amount as he may prescribe, and further, as follows:

> "No permit shall be issued to any one to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State

to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used."

And section 6 contains this further provision:

"In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in Section 5 hereof."

We think we are precluded from deciding or considering the merits of the case, first, by the fact that the Commissioner of Internal Revenue was not made a party to the suit, and, secondly, by the fact that the defendant acting prohibition officer ceased to be such during its pendency.

It is the Commissioner of Internal Revenue, as will be seen from the provisions of the National Prohibition Act that have been referred to, who is authorized to issue a permit for the manufacture,

sale, purchase, transportation, or prescription of any intoxicating liquor, and the bill in the present case expressly alleges that it was the Commissioner who issued the permit upon which the complainants relied—alleging the invalidity of that portion of it restricting the permit to one hundred gallons of distilled spirits and five gallons of wine; and yet the Commissioner was not made a party to the bill, the very purpose of which was to control his action. That under such circumstances the bill could not be maintained, even conceding that it states facts sufficient to constitute a cause of action in the complainants' favor is clearly shown by the decision of the Supreme Court in Warner Valley Stock Company vs. Smith, 165 U. S. 28, and cases there cited.

Even if the Acting Prohibition Director, made sole defendant in the bill, could be held as agent of the Commissioner to dispense with the necessity of making the latter a party, that defendant ceased to be such officer pending the suit.

The judgment of dismissal is

Affirmed.

[Endorsed]: Opinion. Filed January 9, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. FORREST MITCHELL, Substituted in the Place and Stead of E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

This cause came to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, Second Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the judgment of dismissal of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered January 9, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twentieth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. FORREST MITCHELL, Substituted in the Place and Stead of E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the case was heard, it is ORDERED that the

Petition, filed February 6, 1922, on behalf of the appellants, for a rehearing of the above-entitled case be, and hereby is denied.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Notice of Motion for Order Substituting S. F. Rutter in Place of E. C. Yellowley as Appellee Herein.

To JOHN T. WILLIAMS, United States Attorney, and to T. J. SHERIDAN, Assistant United States Attorney, Attorneys for Appellee:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE AND NOTICE IS HEREBY GIVEN that on Monday, the 15th day of May, 1922, at the hour of 10 o'clock A. M. of said day, at the courtroom of the above-entitled United States Circuit Court of Appeals, in and for the Ninth Circuit, situate in the United States Post Office Building,

Seventh and Mission Streets, in the City and County of San Francisco, California, the undersigned on behalf of the appellants will present his motion to the above-entitled court for its order substituting S. N. Rutter in the place and stead of E. C. Yellowley as appellee in all matters and proceedings hereinafter to be taken on the appeal of said matter.

Said motion will be made upon the ground that said E. C. Yellowley, appellee named in said original proceeding, ceased to be Acting Prohibition Director in and for the District of California pending the appeal herein and that E. Forrest Mitchel was duly appointed the successor in office of the said E. C. Yellowley pending the appeal herein and by stipulation of the parties on file herein was substituted as appellee in the place and stead of E. C. Yellowley; and furthermore, upon the ground tha tthe said S. F. Rutter has, since the decision of this said matter by the above-entitled court, been duly appointed to the office of Prohibition Director in and for the District of California in the place and stead of the said E. Forrest Mitchel, and is now the duly qualified and acting Prohibition Director in and for the District of California, and that said substitution is necessary and proper for the purpose of determining the merits of said cause on appeal inasmuch as said proceeding was lawfully commenced against the said E. C. Yellowley in his official capacity and relates to the discharge of the official duties of Prohibition Director under the constitution, laws and statutes of the United States, and for said reasons

said cause should be continued against the said S. F. Rutter as such officer.

Said motion will be based upon this notice and upon all the papers and documents on file or of record, and upon the affidavit of Harry G. McKannay served upon you herewith, and upon that certain Act of Congress set forth in 30 Statutes at Large, at page 822.

Dated: May 8th, 1922.

HARRY G. McKANNAY,
Attorney for Appellants.

[Endorsed]: Notice of Motion for Order Substituting S. F. Rutter in Place of E. C. Yellowley as Appellee. Filed May 9, 1922. F. D. Monckton, Clerk.

Receipt and due service of a copy of the within notice of motion for order substituting defendant and a copy of the affidavit of Harry G. McKannay to be used on application of said Order acknowledged this 9th day of May, 1922.

JOHN T. WILLIAMS,
Attorney for Appellee.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Affidavit in Support of Application for Order Substituting S. F. Rutter as Appellee.

State of California,
City and County of San Francisco,—ss.

Harry G. McKannay, being first duly sworn, deposes and says:

That he is the attorney and solicitor for appellants in the above-entitled cause, and as such is more familiar with the facts and matters herein stated than appellants and for that reason makes this affidavit; that since the perfecting of the appeal in the above-entitled cause from the United States District Court to the United States Circuit Court of Appeals and according to affiant's information and belief during the month of July, 1921, said E. C. Yellowley resigned as Acting Prohibition Director in and for the District of California and E.

Forrest Mitchel was duly appointed Prohibition Director in and for the District of California, and thereafter qualified as such and continued to hold such office until on or about the 1st day of March, 1922, when the said E. Forrest Mitchel resigned and S. F. Rutter was appointed in his place and stead as Prohibition Director in and for the District of California; that the said S. F. Rutter ever since has been, and he now is, the duly qualified and acting Prohibition Director in and for the District of California; that after the argument of said cause before the United States Circuit Court of Appeals and the submission of the same to said court for its determination, the attorneys and solicitors for the appellee therein named filed herein their supplemental citation of authority wherein the attention of this Court and of affiant for the first time was directed to the fact that said E. C. Yellowley had ceased to be Prohibition Director in and for the District of California and that E. Forrest Mitchel had been appointed and qualified as such officer in the place and stead of the said E. C. Yellowley and requested this Court to take judicial notice that the said defendant in error resigned his office and had been succeeded by another person and suggested that the cause could not be further maintained against the Prohibition Director in and for the District of California inasmuch as the defendant in error named in the original bill of complaint had ceased to be such officer and cited the case of Warner Valley Stock Co. vs. Smith, 165 U. S., page 28, 41 L. Ed. 621, as authority for such contention; that upon receipt

of such supplemental authority by affiant, affiant directed the attention of the United States Attorney, as attorney for said appellee and defendant in error, to the Act of Congress of February 8, 1899, which Act is set forth in 30 Statutes at Large, at page 822, wherein and whereby it is provided as follows:

> "No suit, action or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity or in relation to the discharge of his official duties shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office. But, in such event, the court on motion or supplemental petition filed at any time within twelve months thereafter showing the necessity for the survival thereof to obtain a settlement of the questions involved may allow the same to be maintained by or against his successor in office and the court may make such order as should be equitable for the payment of costs."

and further called the attention of said United States Attorney to the case of Smietanka, Collector, vs. Ind. Steel Co., decided Nov. 15, 1921, by the United States Supreme Court to the effect that such an action does not abate upon the death or resignation of an officer of the United States; that thereupon and on the 3d day of December, 1921, the said United States Attorney signed the stipulation in writing for the substitution of E. Forrest Mitchel as defendant in error in the above-entitled matter

and all proceedings to be hereafter had and taken in the matter of this appeal in the place and stead of the said E. C. Yellowley, which said stipulation was on said 3d day of December, 1921, duly filed among the records of said cause by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit; that no order has been made by this Honorable court substituting either the said E. Forrest Mitchel or the said S. F. Rutter as appellee in the place and stead of the said E. C. Yellowley in the above-entitled cause; that according to affiant's information and belief both the said E. Forrest Mitchel, during his incumbency of the office of Prohibition Director of the District of California, and the said S. F. Rutter ever since his incumbency of said office have, and each of them has, as such Prohibition Director, done and performed and continued in force all of the acts and things complained of in said bill of complaint against the said E. C. Yellowley as Acting Prohibition Director in and for the District of California. Affiant therefore avers that the proceeding heretofore commenced by appellants against E. C. Yellowley as Acting Prohibition Director was brought against him in relation to his official acts and related to the discharge of his official duties; that it is necessary to obtain a settlement of the questions therein involved, which questions relate to the legality and constitutionality of certain acts of said official under the laws and Constitution of the United States and relate to the constitutionality of certain regulations and laws of the United States, as more fully appears from the tran-

script of the record on file in this court and the briefs of the parties; that it is necessary in order to obtain a settlement of the questions involved that said cause should be maintained against the successors in office of the said E. C. Yellowley in order that justice should be done.

WHEREFORE affiant prays that a citation be issued to the said S. F. Rutter to show cause before this court at a day certain why he should not be substituted in the place and stead of E. C. Yellowley as appellee herein and why such other and further orders should not be made by this court in relation thereto as may be proper in the premises.

HARRY G. McKANNAY.

Subscribed and sworn to before me this 8th day of May, 1922.

J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Affidavit in Support of Application for Order Substituting S. F. Rutter as Appellee. Filed May 9, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Citation.

The President of the United States of America, to S. F. RUTTER, as Acting Prohibition Director in and for the District of California.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the courtroom of the United States Circuit Court of Appeals, for the Ninth Circuit, in the United States Post Office Building, in the City and County of San Francisco, State of California, on the 15th day of May, 1922, at the hour of ten o'clock A. M. of said day, and then and there show cause, if any there be, why an order of the above-entitled Circuit Court of Appeals should not be made substituting you, the said S. F. Rutter, as Prohibition Director in and for the District of California, as appellee in the above-entitled cause and all proceedings hereinafter to be had

therein in the place and stead of E. C. Yellowley, heretofore the Acting Prohibition Director in and for the District of California and named as appellee in the foregoing matter, and why such other and further orders should not be made in connection therewith as may be meet and proper in the premises.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, this 9th day of May, 1922.

W. H. HUNT,
Judge of the United States Circuit Court of Appeals, Ninth Circuit.

Service by copy of the within Citation is hereby admitted this —— day of April, 1922, together with a copy of the affidavit of Harry G. McKannay praying for the issuance of said Citation.

_____,
Attorney for Appellee.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named S. F. Rutter, as Acting Prohibition Director, by handing to and leaving a true and correct copy thereof with C. H. Wheeler, as Chief Clerk or Chief Deputy of "S. F. Rutter," as Acting Pro. Director, personally, at San

Francisco, in said District on the 11th day of May, A. D. 1922.

J. B. HOLOHAN,
U. S. Marshal.
By Fred S. Field,
Deputy.

[Endorsed]: Citation on Motion for Order Substituting Party Appellee. Filed May 12, 1922. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable MAURICE T. DOOLING, District Judge.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. FORREST MITCHELL, Substituted for E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Order Granting Motion for Substitution of Party Appellee.

Upon consideration of the motion of appellants for order substituting S. F. Rutter in the place of E. Forrest Mitchell, as appellee and on the affidavit of Mr. Harry G. McKannay, in support of said motion, and upon the oral presentation of said motion by Mr. McKannay, as counsel for the appellants, and in support of said motion, Mr. Thomas J. Sheridan, Assistant United States Attorney and counsel for the appellee, having been heard in opposition thereto, and good cause therefor appearing, it is hereby ORDERED that said motion be, and hereby is granted.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for the District of California,

Appellee.

Petition for Appeal from Circuit Court of Appeals for the Ninth Circuit to Supreme Court of the United States.

Waldemar Gnerich and Jeremiah T. Regan, appellants above named and petitioners herein, herewith present their petition in the above-entitled cause for appeal to the Supreme Court of the United States, and in connection herewith the petition of the said appellants respectfully shows and presents: That the above cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a final decree has therein been rendered on the 9th day of January, 1922, affirming the decree of the District Court of the United States for the Northern District of California, Second Division, in dismissing the bill of complaint of complainants; that subsequent to the above men-

tioned decree of this Honorable Court, these appellants petitioned this Court for a rehearing of said cause which petition for rehearing was denied on the 20th day of February, 1922; that this Honorable Court has made an order staying issuance of the Mandate until this appeal is perfected; that the matter in controversy in this cause exceeds the value of One Thousand (1,000.00) Dollars besides costs, as shown by the affidavit annexed hereto; that this cause is one in which the judgment or decree of the Circuit Court of Appeals is not made final by any law of the United States, and is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

WHEREFORE, the said petitioners and appellants, feeling themselves aggrieved by the judgment so rendered and entered by the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, hereby appeal from said judgment and decree of said last named Court, to the Supreme Court of the United States and respectfully pray that said appeal be allowed to them in the above-entitled cause and that an order be made granting such appeal and directing the clerk of the United States Circuit Court of Appeal for the Ninth Circuit to send the records and proceedings in the said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be re-

viewed and if error be found, corrected according to the laws and customs of the United States.

WALDEMAR GNERICH,
JEREMIAH T. REGAN,
Petitioners and Appellants.

HARRY G. McKANNAY,
Attorney for Waldemar Gnerich and Jeremiah T. Regan, Petitioners and Appellants.

State of California,
City and County of San Francisco,—ss.

Waldemar Gnerich, being duly sworn, says:

I am one of the appellants named in the foregoing petition for appeal and am a member of the copartnership conducting the general drug and pharmaceutical business affected by the acts of the appellee as set forth in the bill of complaint. I am familiar with the amount of business done by said copartnership and with the amount of prescription business which has been lost to said copartnership because of the ruling of the Prohibition Commissioner, and I know that the net value thereof prior to the filing of said original action was and is in excess of One Thousand ($1,000) Dollars.

WALDEMAR GNERICH.

Subscribed and sworn to before me this 13th day of March, 1922.

[Seal] JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Petition for Appeal to Supreme Court U. S. Filed May 17, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for the District of California,

Appellee.

Order Allowing Appeal to U. S. Supreme Court.

This day came Waldemar Gnerich and Jeremiah T. Regan, appellants in the above-entitled cause, and by Harry G. McKannay, their attorney and counsel, presented their petition for an appeal, accompanied by an assignment of errors relied on, and upon motion duly made, asked the allowance of said appeal, whereupon it is ORDERED and ADJUDGED that said appeal and claim of appeal be, and the same is, hereby allowed to the Supreme Court of the United States upon the filing of a bond on appeal by the said appellants in the sum of Five Hundred ($500.00) Dollars, the same to operate as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated: May 17, 1922.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. Filed May 17, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for the District of California,

Appellee.

Assignment of Errors on Appeal to U. S. Supreme Court.

Waldemar Gnerich and Jeremiah T. Regan, appellants in the above-entitled cause, in connection with their petition for appeal herein present and file therewith the following assignment of errors as to which matters and things they say that the decree entered herein on the 9th day of January, 1922, is erroneous, to wit:

FIRST: In refusing to enter a decree reversing the judgment and decree of the District Court dismissing the bill of complaint on the ground that said bill did not constitute a cause in equity under the constitution and laws of the United States.

SECOND: In affirming the decree of the District Court granting the motion of the appellee to dismiss complainants' bill of complaint on the ground that the facts alleged in the bill of complaint are insufficient to state a cause of action in equity.

THIRD: In holding and deciding that said Circuit Court of Appeals had no jurisdiction over the subject matter of said cause to grant the relief prayed for therein for the reason that the Commissioner of Internal Revenue was not a party to the suit.

FOURTH: In holding and deciding that the Commissioner of Internal Revenue is a necessary party in a suit whose purpose is to restrain the enforcement by appellee, as Prohibition Director, of a ruling of the National Prohibition Commissioner which is contrary to, and violative of, the regulations published by said Commissioner of Internal Revenue.

FIFTH: In holding and deciding that said Circuit Court of Appeals was precluded from deciding or considering the merits of the cause by the fact that the appellee ceased to be such Acting Prohibition Director during the pendency of the suit.

SIXTH: In failing to hold and decide that the appellee did not exceed the power conferred upon him by law and did not act without his powers as such Prohibition Director in enforcing against appellants a ruling of the Prohibition Commissioner contained in the permit of appellants to purchase,

use and dispense "intoxicating liquors" as said term is defined in the National Prohibition Act, that appellants could not purchase, use and dispense more than 100 gallons of "intoxicating liquors" for medicinal purposes in filling lawfully issued prescriptions and in compounding medicinal preparations, during any quarter.

SEVENTH: In failing to hold and decide that the said purported limitation or ruling of said Prohibition Commissioner on the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which appellants could purchase, use and dispense for strictly medicinal purposes in their business as pharmacists, as set forth in said permit, was not null and void and of no force and effect and beyond the power and without the jurisdiction of "Prohibition Commissioner" at Washington to make and beyond the power and without the jurisdiction of the appellee Prohibition Director to enforce.

EIGHTH: In failing to hold and determine that the "Prohibition Commissioner" had no power to make and appellee no power to enforce any limitation upon appellants' right to use and dispense alcohol and other "intoxicating liquors" for medicinal purposes other than such limitations thereon as are enumerated in the National Prohibition Act itself or contained in the regulations made and published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States.

NINTH: In failing to hold and determine that the "Prohibition Commissioner" has no power to make and appellee no power to enforce any limitation or restriction upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that can be used and dispensed by appellants for other than beverage purposes other than or different from such limitations or restrictions as are expressed in the Eighteenth Amendment to the Constitution of the United States, in the National Prohibition Act itself, or in the rules and regulations duly published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States under the authority of said Act.

TENTH: In failing to hold and determine that the appellee as Acting Prohibition Director of the State of California had no authority to enforce a limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which could be purchased, used and dispensed by the appellants for medicinal purposes in their business as pharmacists other than or different from the limitation fixed and determined by the amount of the bond furnished by appellants under the provisions of Paragraph A, Section 60 of "Regulations 60, relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under article 2 of the National Prohibition Act of October

28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

ELEVENTH: In refusing to enjoin appellee from continuously and irreparably injuring appellants' business by enforcing the limitation and restriction placed in the permit of appellants to dispense "intoxicating liquor" for medicinal purposes and from acting without authority of law and in violation of the rights of appellants to purchase, use and dispense in their business as pharmacists such amounts of alcohol and other "intoxicating liquor" as that term is defined in the National Prohibition Act "as is necessary to the business needs" of the appellants, as authorized by subdivision A, Section 56 of "Regulations 60 relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under Article 2, of the National Prohibition Act of October 28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

TWELFTH: In failing to hold and determine that any rule or regulation of the treasury department published under the authority of the National Prohibition Act or any rule made by the National Prohibition Commissioner or any provision of said National Prohibition Act which has not the purpose and effect of "regulating" the use of "intoxicating liquors" for medicinal purposes but on the contrary has the purpose and effect of "prohibiting" such use is null and void and contrary to the provisions of

the Ninth and Tenth Amendments to the Constitution of the United States.

WHEREFORE said appellants pray that said decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed and that appellants be granted the relief prayed for in their bill of complaint and such other and further relief as may be appropriate.

HARRY G. McKANNAY,
Attorney for Appellants.

[Endorsed]: Assignment of Errors on Appeal to Supreme Court U. S. Filed May 17, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Premium charged for this bond is $10.00 per annum.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Baltimore, Maryland.

No. 30755–22. $500.00.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Bond on Appeal to U. S. Supreme Court.

KNOW ALL MEN BY THESE PRESENTS: That the United States Fidelity and Guaranty Company, of Baltimore, Maryland, is held and firmly bound unto the respondent in the above-entitled action in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said respondent, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, he binds himself, his successors and assigns, firmly by these presents.

Sealed with its seal and dated this 8th day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WHEREAS, the appellants in the above-entitled action have prosecuted an appeal in said action, to the Supreme Court of the United States, to reverse the decree rendered and entered in said action, on the 9th day of January, 1922, in the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, the condition of the above obligation is such, that if the said appellants shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Seal] By HENRY V. D. JOHNS,

By ERNEST W. SWINGLEY,

Attorneys-in-fact.

Approved this 17th day of May, 1922.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: Bond on Appeal to Supreme Court U. S. Filed May 17, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for the District of California,

Appellee.

Citation on Appeal to U. S. Supreme Court.

The President of the United States of America,
To S. F. RUTTER, as Prohibition Director in and for the District of California.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, in the District of Columbia, within sixty (60) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, wherein Waldemar Gnerich and Jeremiah T. Regan are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 17th day of May, 1922.

W. H. HUNT,

Judge, United States Circuit Court of Appeals, Ninth Circuit.

Service by copy of the within citation on appeal is hereby admitted this 18th day of May, 1922.

JOHN T. WILLIAMS,

Attorney for Appellee.

[Endorsed]: Citation on Appeal to Supreme Court U. S. Filed May 18, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty (80) pages, numbered from and including 1 to and including 80, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of May, A. D. 1922.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

Endorsed on cover: File No. 29,033. U. S. Circuit Court Appeals, 9th Circuit. Term No. 483. Waldemar Gnerich and Jeremiah T. Regan, co-partners, doing business under the firm name and style of B. & S. Drug Company, appellants, vs. S. F. Rutter, as prohibition director in and for the district of California. Filed July 14th, 1922. File No. 29,033.

No. [redacted]79

In the Supreme Court
OF THE
United States

WALDEMAR GNERICH and JEREMIAH T. REGAN, copartners doing business under the firm name and style of B. & S. DRUG COMPANY,
Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,
Appellee.

BRIEF FOR APPELLANTS.

HARRY G. MCKANNAY,
LOUIS V. CROWLEY,
Solicitors for Appellants.

Table of Cases Cited.

No. 483

In the Supreme Court
OF THE
United States

WALDEMAR GNERICH and JEREMIAH T. REGAN, copartners doing business under the firm name and style of B. & S. DRUG COMPANY,
Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,
Appellee.

BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

a. Procedure.

This suit was commenced by appellants filing in the United States District Court for the Southern Division of the Northern District of California a bill in equity praying for an injunction restraining appellee as Prohibition Director from doing and performing certain acts in connection with his official duties as Prohibition Director in and for the

District of California, which acts were alleged by appellants to be clearly beyond and without his power and authority as such Prohibition Director, and which acts constituted an unlawful interference with the constitutional rights of appellants and caused appellants to suffer large and continuous damages in their business as pharmacists.

On the hearing of the motion for a temporary injunction, a motion by the then defendant to dismiss the bill was granted on the ground that the bill failed to state facts sufficient to warrant the interposition of a court of equity. An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, which court declined to pass upon the sufficiency of the bill upon tthe grounds, first, that the Commissioner of Internal Revenue was not made a party to the suit, and second, that the original defendant ceased to be Prohibition Director pending the appeal. A petition for a rehearing by said Circuit Court of Appeals was thereafter in due course filed and denied. Thereupon an appeal was taken to the Supreme Court of the United States.

Pending the appeal to the Circuit Court of Appeals, the original defendant, E. C. Yellowley, resigned his office as Prohibition Director for the State of California, and was succeeded by E. Forrest Mitchell, during the month of July, 1921. Thereafter, and likewise pending the appeal, said E. Forrest Mitchell resigned and was succeeded by the

present appellee, S. F. Rutter. An order of substitution of said E. Forrest Mitchell as defendant was made after the submission of the cause to the Circuit Court of Appeals, and an order substituting S. F. Rutter was made by said court after its decision denying the petition for rehearing. (Trans. pp. 42, 66.)

b. The Facts.

Appellants are citizens of the United States and residents of the Northern District of California; and are co-partners in conducting a general pharmaceutical business at San Francisco. Both of appellants are duly licensed by the State of California as pharmacists and are actively engaged in the practice of their profession and in compounding medicinal preparations on physicians' prescriptions, and in dispensing and selling at retail various medicinal preparations, and have been so licensed and occupied for more than ten years last past. In compounding medicinal preparations appellants and all pharmacists must, necessarily use, and have from time immemorial used, alcohol and other distilled spirits in quantities depending entirely upon the volume of business and the number and kind of prescriptions brought to them for filling by their patrons from duly licensed physicians.

In conformity with the National Prohibition Act, and the regulations published by the Secretary of the Treasury and the Commissioner of Internal Revenue under the authority thereof, appellants

and all other pharmacists using alcohol and other "intoxicating liquors" in their business were required to apply for and receive from the Bureau of Internal Revenue of the Treasury Department a permit to dispense and compound medicinal preparations containing such "intoxicating liquors". Appellants duly filled out, verified and forwarded to the Commissioner of Internal Revenue their application on the form prescribed by the Treasury Department, and recited therein that the probable quantity of alcohol and other "intoxicating liquors", as that term is defined by the National Prohibition Act, necessary to the business needs of appellants or required to be on hand or used by them during any quarterly period would be 283 proof gallons of alcohol, 157 proof gallons of whiskey, and 5 gallons of wine. Appellants likewise forwarded with their application a good and sufficient bond on the form prescribed by the Treasury Department in the penal sum of $2,000.00, in conformity with the said regulations. The bond was duly approved and accepted and in due course a permit was issued to appellants authorizing and permitting them among other things

> "to use and sell intoxicating liquor for other than beverage purposes * * * in compounding medicinal preparations on physician's prescription or otherwise medicated according to the standards set forth in Par. A, Sec. 60, Reg. 60 * * * In selling retail as such to others holding permits which confer authority to purchase and use intoxicating liquor for non-beverage purposes. In dispensing as such on a physi-

> cian's prescription given on form 1403 in quantities not exceeding one pint in ten days to same person, and for non-beverage purposes." (Trans. p. 14, Exhibit B.)

The only restriction or limitation placed upon physicians or pharmacists in practicing their profession in relation to the dispensing of alcohol and other intoxicating liquors by either the National Prohibition Act or Regulations 60 published under the authority thereof is that hereinabove set forth in the permit, viz., the same must not be dispensed in quantities exceeding one pint in ten days to the same person and must not be for beverage purposes. Notwithstanding this fact, the Prohibition Commissioner, an office created by the selfsame regulations, inserted in the permit the further attempted limitation, restriction, or prohibition:

> "This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period." (Trans. p. 15.)

Right here we find the crux of this case. Congress in enacting the National Prohibition Act, and the Secretary of the Treasury and Commissioner of Internal Revenue in publishing "Regulations 60" for its enforcement, did not attempt to limit or prohibit the use of alcohol or other distilled or spirituous liquors by physicians and pharmacists, except in the particulars hereinabove stated; and yet, appellants are confronted with the anomalous situation of an individual occupying an office created by the regulations published for the

purpose of enforcing the act, imposing upon appellants an additional limitation and prohibition based upon his own notion or idea of the amount of alcohol and spirits they should use in their business, disregarding appellants' verified statement of their business necessities.

This is all the more perplexing in view of the closing paragraphs of the permit which is as follows:

> "This permit is granted under the conditions that the provisions of National Prohibition Act and regulations issued thereunder will be strictly observed".

Upon receipt of the permit, appellants made applications from time to time to the local prohibition director for permission to purchase alcohol and other distilled spirits. Said applications when approved by the local director constitute permits to purchase under Secs. 54 and 55 of said Regulations 60. On March 2, 1921, in response to a certain application of appellants for permission to purchase one barrel of grain alcohol, they received from the then Prohibition Director a notice that the application was denied for the reason that appellants had already withdrawn for the current quarter a total of 90 gallons and that a permit to purchase a barrel of alcohol would enable appellants to withdraw and use in excess of 100 gallons for the current quarter. Repeated requests were made of the Prohibition Director by appellants that he disregard said 100 gallons limitation inserted in

their permit as an arbitrary, unreasonable, unlawful and void act, but without avail.

Thereupon appellants filed their bill of complaint in the District Court, as above related, to restrain the Prohibition Director from enforcing such limitation and prohibition. (Trans. pp. 1 to 16.)

c. Questions Presented.

From the foregoing, it appears that there are four main questions involved in this appeal:

1. Did the Prohibition Commissioner have the power to place the restriction of 100 gallons in the permit and prohibit the use by appellants of such distilled spirits beyond that limit, and, if not, can appellants have appellee restrained from enforcing the same.

2. Has Congress the power, under the Eighteenth amendment, to restrict or prohibit the use of spirituous liquors for admittedly non-beverage purposes?

3. Was the Commissioner of Internal Revenue a necessary party to the suit?

4. Did the action abate because the original defendant ceased to be Prohibition Director pending the appeal?

II. SPECIFICATIONS OF ERRORS.

We contend that the Circuit Court of Appeals erred in the following particulars:

FIRST: In refusing to enter a decree reversing the judgment and decree of the District Court dismissing the bill of complaint on the ground that said bill did not constitute a cause in equity under the constitution and laws of the United States.

SECOND: In affirming the decree of the District Court granting the motion of the appellee to dismiss complainants' bill of complaint on the ground that the facts alleged in the bill of complaint are insufficient to state a cause of action in equity.

THIRD: In holding and deciding that said Circuit Court of Appeals had no jurisdiction over the subject matter of said cause to grant the relief prayed for therein for the reason that the Commissioner of Internal Revenue was not a party to the suit.

FOURTH: In holding and deciding that the Commissioner of Internal Revenue is a necessary party in a suit whose purpose is to restrain the enforcement by appellee, as Prohibition Director, of a ruling of the National Prohibition Commissioner which is contrary to, and violative of, the regulations published by said Commissioner of Internal Revenue.

FIFTH: In holding and deciding that said Circuit Court of Appeals was precluded from deciding or considering the merits of the cause by the fact that the appellee ceased to be such Acting Prohibition Director during the pendency of the suit.

SIXTH: In failing to hold and decide that the appellee did not exceed the power conferred upon him by law and did not act without his powers as such Prohibition Director in enforcing against appellants a ruling of the Prohibition Commissioner contained in the permit of appellants to purchase, use and dispense "intoxicating liquors" as said term is defined in the National Prohibition Act, that appellants could not purchase, use and dispense more than 100 gallons of "intoxicating liquors" for medicinal purposes in filling lawfully issued prescriptions and in compounding medicinal preparations, during any quarter.

SEVENTH: In failing to hold and decide that the said purported limitation or ruling of said Prohibition Commissioner on the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which appellants could purchase, use and dispense for strictly medicinal purposes in their business as pharmacists, as set forth in said permit, was not null and void and of no force and effect and beyond the power and without the jurisdiction of "Prohibition Commissioner" at Washington to make and beyond the power and without the jurisdiction of the appellee Prohibition Director to enforce.

EIGHTH: In failing to hold and determine that the "Prohibition Commissioner" had no power to make and appellee no power to enforce any limitation upon appellants' right to use and dispense

alcohol and other "intoxicating liquors" for medicinal purposes other than such limitations thereon as are enumerated in the National Prohibition Act itself or contained in the regulations made and published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States.

NINTH: In failing to hold and determine that the "Prohibition Commissioner" has no power to make and appellee no power to enforce any limitation or restriction upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that can be used and dispensed by appellants for other than beverage purposes other than or different from such limitations or restrictions as are expressed in the Eighteenth Amendment to the Constitution of the United States, in the National Prohibition Act itself, or in the rules and regulations duly published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States under the authority of said act.

TENTH: In failing to hold and determine that the appellee as Acting Prohibition Director of the State of California had no authority to enforce a limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which could be purchased, used and dispensed by the appellants for medicinal pur-

poses in their business as pharmacists other than or different from the limitation fixed and determined by the amount of the bond furnished by appellants under the provisions of Paragraph A, Sec. 60 of

> "Regulations 60, relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under article 2 of the National Prohibition Act of October 28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

ELEVENTH: In refusing to enjoin appellee from continuously and irreparably injuring appellants' business by enforcing the limitation and restriction placed in the permit of appellants to dispense "intoxicating liquor" for medicinal purposes and from acting without authority of law and in violation of the rights of appellants to purchase, use and dispense in their business as pharmacists such amounts of alcohol and other "intoxicating liquor" as that term is defined in the National Prohibition Act "as is necessary to the business needs" of the appellants, as authorized by subdivision A, Sec. 56 of

> "Regulations 60 relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under Article 2, of the National Prohibition Act of October 28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

TWELFTH: In failing to hold and determine that any rule or regulation of the Treasury Department published under the authority of the National Prohibition Act or any rule made by the National Prohibition Commissioner or any provision of said National Prohibition Act which has not the purpose and effect of "regulating" the use of "intoxicating liquors" for medicinal purposes but on the contrary has the purpose and effect of "prohibiting" such use is null and void and contrary to the provisions of the Ninth and Tenth Amendments to the Constitution of the United States. (Trans. pp. 71 to 76.)

III. BRIEF OF THE ARGUMENT.

1. Neither the Prohibition Commissioner, or appellee Prohibition Director, has any power other than those specifically granted either by the Prohibition Act or the regulations creating their respective offices.

National Prohibition Act, Title II, Section 1, Subd. 7;

22 Cyc. 1657;

Thatcher v. U. S., 23 Fed. Cas. No. 13,581;

Campbell v. U. S., 107 U. S. 407;

Regulations 60 Relative to the Manufacture, etc., of Intoxicating Liquor, issued by the U. S. Treasury Dept., Bureau of Internal Revenue, edition of Feb. 1, 1920.

2. An injunction will always be granted to restrain an illegal and excessive use of authority.

22 Cyc. 879;

Noble v. Union River Logging Co., 147 U. S. 165; 13 Sup. Ct. 271; 37 Law Ed. 123;

Frayser v. Russell, 9 Fed. Cas. No. 5067; 3 Hughes 227;

McKenzie v. Fisher, 40 App. (D. C.) 74;

Union Distilling Co. v. Bettman, 181 Fed. 419;

Waite v. Macy, 246 U. S. 606; 38 Sup. Ct. 395; 62 Law Ed. 892;

Hoffman Brewing Co. v. McElligott, 259 Fed. 525;

Kuenster v. Meredith, 264 Fed. 243;

Griesedeick Bros. Brewing Co. v. Moore, 262 Fed. 582;

Bulger v. Benson, 262 Fed. 929;

Lambert v. Yellowley, 291 Fed. 640.

3. The Eighteenth Amendment does not authorize the Congress to limit, restrict, or prohibit the use of spirituous liquors for any purpose other than *beverage* purposes, inasmuch as said amendment is a grant of power and the Congress has no right to enlarge the grant by legislation.

Constitution of U. S., Articles IX and X;

Hodges v. U. S. 203 U. S. 1;

Kansas v. Colorado, 206 U. S. 46, 87, 88;

U. S. v. Lackey, 99 Fed. 952;

Civil Rights Cases, 109 U. S. 3;

Hammer v. Daggenhart, 247 U. S. 251;

U. S. v. Dervitt, 9 Wall. 41;
Lambert v. Yellowley, 291 Fed. 640;
United States v. Freund, 290 Fed. 411.

4. The regulation of the practice of medicine and pharmacy are matters clearly within the domain of the powers reserved to the States, no part of which has been granted to the Federal Government by the Eighteenth Amendment.

Lambert v. Yellowley, 291 Fed. 640;
Slaughter Houses cases, 16 Wall. 36;
United States v. Freund, 290 Fed. 411.

5. The action did not abate by the resignation of the original defendant as Prohibition Director pending the appeal to the Circuit Court of Appeals.

30 Stat. at Large, 822;
Smietanka, Collector, etc. v. Indiana Steel Co., 257 U. S. 1.

6. The Prohibition Commissioner was not a necessary party to the action.

IV. ARGUMENT.

1. Neither the Prohibition Commissioner, nor Appellee Prohibition Director, have any powers other than those specifically granted either by the Prohibition Act or the regulations creating their respective offices.

It is worthy of note that neither the Eighteenth Amendment nor the National Prohibition Act created any new office. By the act its enforcement is placed with the Treasury Department, and the

Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is given power to prescribe and publish "Regulations" for its enforcement. (Subd. 7, Sec. 1, Title II, National Prohibition Act.)

This power the Commissioner has exercised in the published Regulations wherein the offices of "Prohibition Commissioner" and "Prohibition Director" are created. To be lawful, regulations must first be prepared by the Commissioner of Internal Revenue and have the approval of the Secretary of the Treasury, and, second, be published.

> "It is fundamental that the law-making power is exclusively in Congress and cannot be delegated to any other department; but regulations made by an executive department in pursuance of authority delegated by Congress have the force of law, and are of as binding force as if incorporated in the body of the act. * * * The Commissioner is authorized to make regulations to carry out the law; nevertheless the Commissioner cannot alone, or in connection with the Secretary of the Treasury alter or amend the law."
>
> 22 Cyc. 1657;
>
> Thatcher v. U. S., 23 Fed. Cas. No. 13851.

In Campbell v. U. S., 107 U. S. 407, while the facts are not pertinent to the case at bar, yet, commenting upon the power to make regulations, the court said:

> "It will be a curious thing that Congress, after clearly defining the right of the importer to receive drawback upon subsequent importa-

> tions of imported articles on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable."

Congress having recognized the right of physicians to prescribe liquor and of pharmacists to fill prescriptions and compound medicinal preparations within the limitations fixed by the National Prohibition Act and the therapeutic value of spirituous liquors being likewise conceded by said act, it would seem that these rights could not be curtailed or their exercise prevented or cut down by the dictum of an officer who is the mere creature of the regulations published for the express purpose of "carrying out the provisions" of the act.

Physicians are granted the right to practice medicine, and pharmacists the right to compound medicinal preparations and dispense the same, under and by state laws. They did not acquire any right so to do under any law of the United States, or under or by virtue of any permit issued to them by the National Prohibition Commissioner or the Commissioner of Internal Revenue. In making the application for a permit under the regulations aforesaid a pharmacist furnishes whatever information is necessary to show the Commissioner that he has been, under the laws of his state, duly licensed to practice pharmacy; that he has a definite location

of business where he dispenses medicinal preparations and compounds prescriptions; that he has never broken the law and that he has used and will necessarily continue to use alcohol and other liquor for medicinal purposes; that he will properly account for every drop of liquor in his possession, and thereafter purchased by him, and satisfy the Commissioner that the same, and every drop thereof, has been used for medicinal purposes only, and not as a beverage. The Commissioner and his assistants under the regulations published are afforded every facility for determining whether or not a pharmacist has been dispensing liquors for medicinal purposes only, or whether he is hiding behind his state license as a pharmacist to dispense liquors for beverage purposes. The permit is granted to him and he is required to fill out numerous reports and to keep accurate records showing and accounting for all liquor purchased by him or in his possession. Permits to purchase limit the amount he can obtain and he can only dispense the same upon legitimate prescriptions issued and directed to him by a licensed physician who likewise holds a permit under the same law and regulations, to issue prescriptions for intoxicating liquors. (See National Prohibition Act, Title II, Sec. 7.) All of such records, permits and prescriptions are upon blank forms furnished by the Treasury Department. The pharmacist furnishes a bond to protect the government against fraud on his part in purchasing, dispensing and accounting for said liquors or in using

said liquors for anything other than medicinal purposes, the form and amount of which bond is likewise fixed by the regulations. (See "Regulation 60", pp. 86 to 110.) In the case at bar the appellants are found to be pharmacists duly qualified under the laws of the State of California, to practice their profession and they accompanied their application for a permit to dispense intoxicating liquors for medicinal purposes with a bond sufficient in amount under the regulations to entitle them to purchase or have on hand for said use during any quarterly period an amount not exceeding five hundred gallons. The Prohibition Commissioner's edict, however, is that appellants can only have on hand or use one hundred gallons per quarter, which action on the part of said Commissioner instead of constituting a regulation, has no basis or authority in the published regulations, is contrary to the express language thereof, and is a plain case of usurpation of legislative power, by the Prohibition Commissioner, and in so far as appellants are concerned results in a denial to them of their constitutional rights.

Appellants were required in their application for a permit under the regulations to state the amount of alcohol and intoxicating liquor they would likely use in their business during any quarterly period. Guided by the business demands for previous quarters, enlightened by their own records of the quantity previously used, they state that 283 proof gallons of alcohol and 157 proof gallons of whiskey

per quarter will be the probable amount required in their business. Under the regulations (Sec. 20a) a bond of two thousand dollars, sufficient to cover this amount, was furnished the government with the application.

The bond and application are approved, a permit is granted, but without authority, rhyme or reason, the Prohibition Commissioner inserts therein: "This permit is issued for 100 gallons of distilled spirits per quarter." He could just as readily have said "*one thousand* gallons per quarter", or perchance "*ten* gallons per quarter", or, if his whim so dictated: "*No* gallons per quarter."

Such attempted exercise of discretion on his part is contrary to the following provisions of "Regulations 60", etc., *supra*, which determine in no uncertain language that the quantity that can be purchased and dispensed is fixed by the bond filed, and "the business needs of the applicant", and not otherwise:

> Section 22. "Whenever the quantity of intoxicating liquor or other preparations debited against the bond is such that the existing penal sum is not sufficient, a new bond must be furnished in sufficient sum to cover all liability."
>
> Section 55a. "The applicant must assure himself that the quantity of intoxicating liquor outstanding as a debit against his bond, together with the additional quantity applied for, is not in the aggregate greater than the quantity covered by the penal sum of the bond."
>
> Section 56a. "*Such applications to purchase may call for amounts of liquor necessary to*

the business needs of the applicant, provided that the aggregate amount secured in any quarterly period does not exceed the amount covered by the penal sum of the applicant's bond."

Section 55d. "Applications for permit to purchase will be made in triplicate, except that when transportation is involved, one or two additional copies should be made for delivery to the carrier or carriers at the point of destination as required by Article XVI. All copies will be forwarded to the director, *who, if he finds the applicant entitled to procure intoxicating liquor, and if the applicant's bond is sufficient, will approve all copies of the application and note upon them the date of expiration.*"

Section 20. "All persons desiring to obtain permits provided by these regulations, except as provided below, must at or before the time of filing application therefor, file with the Director a bond in duplicate on Form 1408 or Form 1409, to insure compliance with the provisions of this Act, and of these regulations, as well as to cover any taxes and penalties which may be imposed under the Internal Revenue laws. * * *

(a) Except where otherwise provided, the basis of the penal sum of such bond will be as follows: $4.20 per proof gallon, or fractional part thereof, on wine, malt liquor, cider or other liquor manufactured or received during any quarterly period of the calendar year plus the quantity on hand at the end of the preceding quarterly period. In no case shall the penal sum of any bond be less than $1000, nor more than $100,000."

Nowhere do said "Regulations 60" purport to contain any grant of authority or discretion to the

Commissioner of Internal Revenue, or to the "Prohibition Commissioner", or the "Prohibition Director", to place any limitations or prohibition upon the amount of liquor that might be dispensed by any licensed pharmacist other than that indicated in the penal sum of his bond, and "the business needs of the applicant."

If appellants have done, or if in the future they do, any act in violation of law, ample authority exists under the law for the revocation of their permit and for their punishment by fine or imprisonment. Being possessed of such a permit, they are entitled as shown above to have their applications to purchase liquor approved, providing their purchases do not exceed the amount permitted by the penal sum of their bond.

As stated by District Judge Bourquin, in dealing with the same regulations in so far as they affect physicians, in the case of U. S. v. Freund, 290 Fed. 411:

> "No doubt Congress was inspired by consciousness of the well known abuse of alcohol in the guise of remedies. In that is justification for reasonable regulations, and the statute contains them, viz., that no physician can prescribe alcohol unless he has secured a permit from the Commissioner of Internal Revenue, and has given bond; that he shall prescribe alcohol only in good faith as necessary medicine, and only upon official forms supplied by the Commissioner, except in emergency; and that he shall keep a record thereof.

In addition, for violations, not only is the physician subject to criminal penalties, but the Commissioner may revoke the permit and thus deprive him of right to further prescribe alcohol. These regulations are appropriate to the prohibition of alcohol as a beverage, are adapted to that end, and are valid. Of them, can be no just complaint. They and their like ought to suffice to restrain therapeutical uses of alcohol within legitimate bounds.

They may fail; nevertheless is no power by virtue of the Eighteenth Amendment to impose regulations and restrictions invalid as aforesaid. If these latter can be fairly claimed to tend to prohibition, if not too remote they are without congressional power for reasons aforesaid.

If a physician cannot be trusted wholly he should not be trusted partially. If he is disposed to abuse prescription of alcohol, he can do so as well with one hundred prescriptions and one-half pint, as with more. At most it is a mere difference in degree, wherein the restrictions invalid as aforesaid might seriously affect physician and patient, and little or none, prohibition."

It seems the height of absurdity that Congress can enact a law, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, prescribe regulations for its enforcement, wherein alcohol and "intoxicating liquor" are recognized as definite therapeutic agencies and licensed physicians are authorized and permitted to prescribe its use by their patients and pharmacists licensed and permitted to fill such prescriptions, and yet at the same time seriously urge that a local Federal Prohibition Director or a Federal Prohibition Commis-

sioner, who may know nothing about medicine or pharmacy or the lawful and necessary requirements of a pharmacist's business, or of the particular needs of the applicant's business, in the exercise of their official powers, can set aside said law and said regulations, set at naught the medical experience of the ages, as represented in the skill and learning of the physician, and substitute guesswork in lieu thereof. Without desiring to be facetious or sacrilegious, but merely to carry out the absurdity of such contention, it would seem that such claim of authority is only consistent with a power to regulate or prohibit the amount of human ailments that shall exist during any particular quarter of the calendar year in any locality, that require the attendance of a physician.

2. An injunction will always be granted to restrain an illegal and excessive use of authority.

"Where public officers are acting illegally or without authority and in breach of trust and are causing irreparable injury or a multiplicity of actions at law, they will be enjoined."

22 Cyc. 879;

Noble v. Union River Logging R. Co., 147 U. S. 165; 13 Sup. Ct. 271; 37 Law Ed. 123;

Frayser v. Russell, 9 Fed. Cas. No. 5067; 3 Hughes 227;

Lambert v. Yellowley, 291 Fed. 640.

Injunction should be granted, in the absence of an adequate remedy at law to restrain a threatened

violation of plain official duty, requiring no exercise of discretion, or the threatened destruction of a vested right by an act clearly beyond the official's authority.

McKenzie v. Fisher, 40 App. (D. C.) 74.

A distiller is entitled to an injunction to restrain the enforcement by the Internal Revenue Department of any unauthorized order requiring a distilled product known to the trade as "spirits" to be branded as alcohol, which as known to the trade is an inferior and cheaper product.

Union Distilling Co. v. Bettman, 181 Fed. 419 (C. C. Ohio 1908).

A suit in equity may be maintained to enjoin the Board of Tea Appeals under the Act of March 2, 1897, from following illegal tests prescribed in "Regulations" of Secretary of Treasury who designated the board, for there is a presumption that the board will obey the orders of its superior.

Waite v. Macy, 38 Sup. Ct. 395; 246 U. S. 606; 62 Law. Ed. 892.

The action of a deputy collector of revenue in refusing to license or sell revenue stamps to a concern which he claims was violating the War Time Prohibition Act, may be enjoined.

Hoffman Brewing Co. v. McElligott, 259 Fed. 525.

The threatened revocation by the Secretary of Agriculture of a live stock commission agent's license under the Food Control Act, may be enjoined,

as there is no adequate remedy at law and irreparable injury would result from such revocation.

Kuenster v. Meredith, 264 Fed. 243.

> "Courts have jurisdiction to enjoin public officers from enforcing unconstitutional acts, for such officers in enforcing such acts, become mere intermeddlers and are not entitled to protection as officers."
>
> Greisedieck Bros. Brewing Co. v. Moore, 262 Fed. 582.

An injunction lies to restrain the threatened criminal prosecution of a physician under the National Prohibition Act for prescribing in good faith as medicine to be taken internally by his patients within any period of ten days more than one pint of spirituous liquor when such use in the judgment of the physician is necessary to afford relief from some known ailment.

Lambert v. Yellowley, 291 Fed. 640.

In the case of Bulger v. Benson (C. C. A. 9th Cir.), 262 Fed. 529, an order of a local board of steamboat inspectors suspending the license of a pilot was enjoined, where, in making the order, they exceeded their powers.

3. The Eighteenth Amendment does not authorize the Congress to limit, restrict or prohibit the use of spirituous liquors for any purpose other than BEVERAGE purposes, inasmuch as said amendment is a grant of power and the Congress has no right to enlarge the grant by legislation.

The language of the Eighteenth Amendment, pertinent to the case at bar is as follows:

> "Sec. 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for *beverage purposes* is hereby prohibited." (Italics ours.)

The use of the language "for beverage purposes" evidently shows that the states intended to grant out of themselves to the Federal Government the power to prohibit the use of intoxicating liquor for the purposes therein specified and for no other purpose. It is therefore obvious that the people in passing such an amendment reserved to themselves, and retained within the great reservoir of all power except that which has been expressly granted away, the right to legislate through their state legislatures on the subject of the use of liquors for medicinal or sacramental purposes. The only qualification of this statement might be found in the existence of an implied grant to Congress of power to regulate the use of liquor for medicinal and sacramental purposes in so far only as such regulation would be necessary properly to prohibit the use of liquor for beverage purposes.

Inasmuch as the Eighteenth Amendment is a grant of power, Congress had no right to enlarge the grant by legislation.

Congress has no power under the enforcement clause of the Eighteenth Amendment to enlarge the scope of the expressed grant of power therein contained so as to *prohibit* the use of liquors for recog-

nized non-beverage purposes. The incidental power to enforce a grant cannot be used to enlarge and expand the grant itself, especially is this so when to allow it would impinge upon the powers reserved in the states.

Constitution of U. S., Articles IX, X;
Hodges v. U. S., 203 U. S. p. 1;
Kansas v. Colorado, 206 U. S. 46, 87, 88;
U. S. v. Lackey, 99 Fed. p. 963;
Civil Rights Cases, 109 U. S. 3;
Hammer v. Daggenhart, 247 U. S. 251;
U. S. v. Dervitt, 9 Wall. 41.

In the Intoxicating Liquor cases, 253 U. S., page 976, the Supreme Court recognizes that the power of Congress is limited in legislating upon the subject of intoxicating liquors in the following language:

> "While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think these limits are not transcended by the provision of the Volstead Act wherein liquors containing as much as one-half of one per cent of alcohol by volume and fit for use for beverage purposes are treated as within their power."

It seems to follow, therefore, that if there are limits beyond which Congress cannot go in defining what shall constitute intoxicating liquors, for *beverage purposes* certainly we are safe in concluding that Congress would have no power by legislation to *prohibit* the use of spirituous liquors for admittedly *non-beverage purposes.*

Lambert v. Yellowley, 291 Fed. 640.

4. The regulation of the practice of medicine and of pharmacy are matters clearly within the domain of the powers reserved to the states, no part of which have been granted to the Federal Government by the Eighteenth Amendment.

The relations of the state and federal government, one to the other, was clearly outlined and definitely set forth in the opinion of the Supreme Court in the Slaughter House cases (16 Wall. 36). Commenting upon this subject, Justice Clark of the Supreme Court in his dissenting opinion in the Intoxicating Liquor cases, supra, speaks as follows:

> "In the slaughter house and other cases the court was urged to give a construction to the Fourteenth Amendment which would have radically changed the whole constitutional theory of the relations of the state and federal governments, by transferring to the general government that police power through the exercise of which the people of the various states theretofore regulated their local affairs in conformity with the widely differing standards of life, of conduct and of duty which must necessarily prevail in a country of so great extent as ours, with its variety of climate, of industry and of habits of the people. But this court resisting the pressure of the passing hour, maintained the integrity of state control over local affairs to the extent that it had not been deliberately and clearly surrendered to the general government. * * *"

It has never been advanced to my knowledge that the right to legislate upon the subject of the practice of medicine and pharmacy was one within the domain of Congress. If that right still rests within the powers of the state, then it follows without

argument that Congress cannot substitute its judgment in place of that of the physician or pharmacist in the lawful practice of their respective professions, or determine to what extent liquors or alcohol could or should be used in given cases or to what extent human ailments in any particular locality will require the services of a physician or pharmacist. It would seem, therefore, for aught that is contained in the Eighteenth Amendment or necessarily implied therefrom, that the right to practice medicine and pharmacy is as free and unrestricted since the adoption of the Eighteenth Amendment and the Volstead Act as it had been theretofore, and no Act of Congress or no act of the Commissioner under any regulations published by authority thereof can have the purpose or effect of cutting down, preventing or prohibiting the free exercise of those professions. The effort of counsel have been unable to uncover a solitary instance where it has been seriously contended that the power to regulate the practice of medicine and of pharmacy has in any manner been affected in the states by the adoption of the Eighteenth Amendment.

In the exercise of the authority granted to it under the provisions of the Eighteenth Amendment, Congress enacted the so-called Volstead or National Prohibition Act, entitled as follows: "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of highproof spirits for other than beverage purposes, and to in-

sure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries." Title II of this act is entitled, "Prohibition of Intoxicating Beverages". At this point it is well to note that the language of the Eighteenth Amendment is that the manufacture, etc. of intoxicating liquors for beverage purposes is prohibited. In other words, the use of intoxicating liquors to be imbibed as a drink is prohibited. The act, however, proceeds to use the word "beverages" as synonymous with "liquors" and proceeds to prohibit their use for *all* purposes except as authorized therein for witness, Sec. 3 of Title II thereof, reads as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, *manufacture, sell, barter, transport, import, export, furnish or possess any intoxicating liquor except as authorized in this act, and all of the* provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. *Liquor for non-beverage purposes* and wine for sacramental purposes *may be manufactured, purchased, sold, bartered, transported, imported, delivered, furnished and possessed, but only as herein provided,* and the commissioner may, upon application, issue permit therefor."

Bearing in mind the language of the Constitutional Amendment and assuming without admitting that the necessity exists for regulating the use of intoxicating liquor for medicinal and sacramental purposes, in order that its use for beverage pur-

poses may not be abused, the very most that can be said against the use of liquors for medicinal and sacramental purposes, is that they are merely *regulated* by the Acts of Congress and the regulations published thereunder and that their uses for said latter purposes is neither restricted nor prohibited. It is obvious that Congress not having the power to prohibit the use of intoxicating liquor for medicinal or sacramental purposes it could not pass any law which in its operation would prevent absolutely the use of intoxicating liquors for such purposes, nor could it authorize the publication of regulations by the Commissioner whereby the same result would be accomplished for it is evident that these powers are still reserved in the states and most certainly the administrative officers of the Treasury Department whose official lives were created by the regulations in question could not rise above the source of their power and accomplish and do the things that Congress itself is powerless to do. On this subject, the Supreme Court has stated in the case of Thatcher v. United States (103 U. S. 679, 26 Lawyer's Edition 535),

> "It is certainly true that the Commission of Internal Revenue cannot alone or in connection with the Secretary of the Treasury alter or amend the Internal Revenue Law. All he can do is to carry into effect that which Congress has enacted. His regulation in aid of the law must be reasonable and made with the view to the assessment and collection of revenue."

In Morrow v. Jones, 106 Fed. 466, the court says:

> "The Secretary of the Treasury cannot by his regulations alter or amend the Revenue Law. All he can do is to regulate the mode of proceedings to carry into effect what Congress has enacted."

In U. S. v. 200 Barrels of Whiskey, 95 U. S. 571, the court says:

> "The regulations of the commissioner do not amend the law. They may aid in carrying it into execution as it exists, but cannot change its positive provision."

I take it as axiomatic, therefore, that no power having been granted to Congress to prohibit the use of liquor for medicinal or sacramental purposes, any Act of Congress or any regulation published under the authority of any Act of Congress, which in effect prohibits the use of liquor for either of these purposes, are violations of the provisions of the Ninth and Tenth Articles of the Constitution of the United States and are absolutely void. From aught that is said in the Eighteenth Amendment, the practice of medicine, of pharmacy and of one's religion remains as it was before the adoption of this amendment. Admitting for the purposes of this brief the power to regulate the uses of alcohol for purposes that are still lawful then there must be some means afforded under the law and the regulations for one to practice medicine and pharmacy and observe the use of wine in connection with his religious practices as freely as ever before.

There should be some avenue open, that by complying with some regulation or by the keeping of records, the furnishing of bonds or other guarantees that will protect the government against fraud, the pharmacist and the medical man can practice their respective professions and use alcohol and other distilled spirits in connection therewith and Rabbis, Priests and Ministers of the Gospel use wines in connection with their religious practices to the extent that they were wont to use them prior to the passage of the National Prohibition Act and the Eighteenth Amendment to the Constitution.

5. The action did not abate by the resignation of the original defendant as prohibition director pending the appeal to the Circuit Court of Appeals.

The authority upon which the Circuit Court of Appeals rested its decision that this action abated upon the resignation of the original defendant from office, namely, Warner Valley Stock Co. v. Smith, 165 U. S. 28, was decided by the Supreme Court of the United States on January 11, 1897, and went no further than to hold that an action against the Secretary of the Interior and the Commissioner of the General Land Office to quiet title to plaintiff's land abated as to the Secretary of the Interior upon his resignation from his office and that such action could not afterwards be maintained against the Commissioner alone. This case ceased to be an authority on February 8th, 1899, when Congress passed an act to prevent the abatement of certain

actions, which act is set forth in 30 Statutes at Large at page 822. It is as follows:

> "No suit, action or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity or in relation to the discharge of his official duties shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office. But in such event, the court on motion or supplemental petition filed at any time within twelve months thereafter, showing the necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office and the court may make such order as should be equitable for the payments of costs."

This act was interpreted in the case of Smietanka Collector v. The Indiana Steel Co., decided November 15th, 1921, by the United States Supreme Court, wherein it is stated:

> "No different conclusion results from the Act of February 8, 1899, Chapt. 121, 30 Stats. at Large 822, Comp. Stat. Par. 1594; 8 Fed. Stat. Ann., 2nd Ed., p. 593. That is a general provision that a suit by or 'against an officer of the United States in his official capacity' should not abate by reason of his death, or the expiration of his term of office, etc., but that the court, upon motion within twelve months, showing the necessity for the survival of the suit to obtain a settlement of the question involved, may allow the same to be maintained by or against his successor in office."

The authority cited by the appellee and upon which the Circuit Court of Appeals decided that it was precluded from deciding the case on its merits was not filed by appellee until several weeks after the submission of the cause. Appellants having had no opportunity of replying thereto, called upon the United States District Attorney and directed his attention to the enactment of the statute hereinabove referred to and to the decision of the United States Supreme Court hereinabove cited. Thereupon the United States Attorney stipulated in writing, which stipulation is on file among the records on appeal, that the action need not abate but could be maintained against the successor in office of the defendant in error. From the language of the opinion of the Circuit Court of Appeals we fear that this stipulation escaped.

We respectfully submit that inasmuch as the case upon which the opinion and decision of the Circuit Court of Appeals was based ceased to be an authority both by the express statutory enactment of Congress and by a later decision of the Supreme Court of the United States, and inasmuch as the decision of the Circuit Court of Appeals was furthermore based upon the belief that the action of the "Federal Prohibition Commissioner" as complained of in the bill of complaint was the action of the Commissioner of Internal Revenue, the Circuit Court of Appeals was not precluded from deciding the case on the merits.

6. The Prohibition Commissioner was not a necessary party to the action.

The Circuit Court of Appeals considered further that it was precluded from deciding or considering the merits of the case, because the Commissioner of Internal Revenue was not made a party to the suit. To quote from the opinion of the court:

> "It is the *Commissioner of Internal Revenue*, as will be seen by the provisions of the National Prohibition Act that have been referred to, who is authorized to issue a permit for the manufacture, sale, purchase, transportation or prescriptions of any intoxicating liquor, and a bill in the present case expressly alleges that it was the Commissioner who issued the permit upon which the complainants relied, alleging the invalidity of that portion of it restricting the permit to one hundred gallons of distilled spirits and five gallons of wine, and yet the Commissioner was not made a party to the bill, the very purpose of which was to control his action. That under such circumstances the bill could not be maintained even conceding that it states facts sufficient to constitute a cause of action in the complainant's favor is clearly shown by the decision of the Supreme Court in Warner Valley Stock Company v. Smith, 165 U. S. 28, and cases there cited."

It is true that in the bill of complaint it is alleged that the "Commissioner" issued the permit, but it will be noted that the "Commissioner" referred to therein is the "Prohibition Commissioner" and not the "Commissioner of Internal Revenue" as stated in the opinion of the court. The "Prohibition Commissioner" is a creature of the regulations,

published by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, as pleaded in the bill of complaint. It has been and is the contention of the appellants that, being a creature of the regulations, that official had only such powers as are specifically granted to him therein and none other. Being authorized by the regulations to issue permits, in doing so he cannot enlarge upon the powers therein specifically granted to him. Appellants have been unable to find in the law or the regulations, and defendant in error has not pointed out any grant to that officer of any discretion to insert the restrictions in appellants' permit of which we complain. The instrument which breathed the breath of life into his official body, viz., the regulations, is the mode and the measure of his power and unless that instrument authorizes him in his official capacity to determine the amount of liquor that can lawfully be used and dispensed by the appellees then such an attempted limitation and prohibition by that officer was his personal action, without official sanction and as void as if it had been inserted in the permit as a prank or a joke by a total stranger.

The conclusion of the Circuit Court of Appeals that the Commissioner of Internal Revenue is a necessary party, we respectfully represent, could only flow from an *a priori* determination that the appellee in enforcing against appellants the restriction complained of was acting within the authority conferred upon him and the Prohibition

Commissioner by the law and the regulations. Assuming that the lower court's reasoning be correct and assuming that the Commissioner of Internal Revenue was before this court in this or any similar proceeding involving the same facts, under the language of the law and the regulations would he not have a complete answer to appellants' complaint in that the restriction sought to be enforced against appellants by appellee is not the act of the Commissioner of Internal Revenue but the personal act of the National Prohibition Commissioner? We must conclude therefore that, unless the published regulations specifically authorize the National Prohibition Commissioner in his discretion to insert in permits limitations other than those specifically enumerated in the act and the regulations, the Commissioner of Internal Revenue could and would deny responsibility for the act of his subordinate. To state the converse of the proposition, assuming that appellants' bill of complaint otherwise states a cause of action for the interposition of a court of equity, how could it be made to state a cause of action against the Commissioner of Internal Revenue unless it first be shown that said official authorized the action of his subordinate and that it was within the scope of his authority?

The Circuit Court of Appeals expressed in its opinion the view that it is "the very purpose of this action to control the action of the Commissioner of Internal Revenue". This we submit is error, inasmuch as we are unable to attribute to that offi-

cial responsibility for any of the acts of which we complain, and we know of no conduct on his part that in any manner infringes upon our rights, unless it be held that the acts of the National Prohibition Commissioner and the defendant in error are consistent with and authorized by the language and provisions of the regulations published by the Commissioner of Internal Revenue. In Subdivision 7 of Title II of the National Prohibition Act it is provided that "any act authorized to be done by the Commissioner (of Internal Revenue) may be performed by any assistant or agent designated by him for that purpose". But the regulations published by the Commissioner of Internal Revenue creating the office of National Prohibition Commissioner do not purport to grant the latter official the power to do the acts complained of and so far as we can determine from anything in the act or the regulations the Commissioner of Internal Revenue himself does not claim to possess any such power, and so far as appellants are concerned he has never attempted to exercise such power.

Furthermore assuming as we contend that the Congress had no power under the National Prohibition Act to place in said act the restrictions and prohibitions set forth therein against the practice of medicine and pharmacy and that said National Prohibition Act is in those particulars unconstitutional and void, then the enforcement of said restrictions can be enjoined as against any public officer attempting to enforce them.

> "On the other hand laws and means that infringe the aforesaid requirements of valid congressional enactments are such in name only, are ineffective, unenforcible, and of the concern, power and duty of the courts to so determine, adjudge and declare whenever brought within their jurisdiction."
>
> U. S. v. Freund, supra.

The bill of complaint shows that appellants are acting not only in their individual capacity, but also at the behest of the Retail Druggists' Association of San Francisco and the Alameda County Pharmaceutical Association. These associations of business men hope for and expect some word from this court that will serve as a guide to them in determining the limits of their rights as citizens and pharmacists to pursue their legitimate professions within the law. Assuming, as we respectfully believe the law to be, that the appellee is acting in an unofficial, arbitrary, unlawful and unwarranted manner and is preventing literally hundreds of firms within this jurisdiction, of their constitutional right to practice a lawful, humanitarian and needful profession except to the extent that he vouchsafes they should practice it, we respectfully submit that the balance of inconvenience lies rather with the appellants than with the official whose personal views may suffer violence by a decision on the merits. Desiring to know and obey the law, appellants urgently and respectfully ask that the issues of law hereinabove referred to be interpreted for

them to the end that their losses and inconvenience be reduced to a minimum at the earliest moment consistent with the orderly procedure of our courts.

CONCLUSION.

Wherefore, it is respectfully submitted that the Bill of Complaint properly states a proper case for the issuance of an injunction and it should be so ordered and the cause remanded for that purpose.

Dated, San Francisco,
February 9, 1924.

HARRY G. MCKANNAY,
LOUIS V. CROWLEY,
Solicitors for Appellants.

INDEX.

CASES CITED.

STATUTE AND REGULATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

WALDEMAR GNERICH AND JEREMIAH T. Regan, copartners, doing business under the firm name and style of B. & S. Drug Company, appellants,
v.
S. F. RUTTER, AS PROHIBITION DIRECTOR in and for the District of California.
No. 79.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLEE.

STATEMENT.

This appeal brings before the court a decree of the Circuit Court of Appeals for the Ninth Circuit entered in a suit filed by appellants in the District Court for the Northern District of California against the Acting Federal Prohibition Director in and for that District to restrain him from enforcing the provisions of a permit restricting the amount of intoxicating liquors appellants might use and sell for nonbeverage purposes during any quarterly period.

Appellants are pharmacists regularly engaged in the practice of their profession of compounding medicinal preparations on physicians' prescriptions and dispensing and selling various medicinal preparations at retail. In conformity with the provisions of the National Prohibition Act and the regulations published by the Secretary of the Treasury and the Commissioner of Internal Revenue under authority thereof, appellants and all other pharmacists using alcohol and other intoxicating liquors in their business were required to apply for and receive from the Bureau of Internal Revenue a permit to compound and dispense medicinal preparations containing such liquors. Appellants forwarded to the Commissioner of Internal Revenue their application on the prescribed form and recited therein that the probable quantity of alcohol and other intoxicating liquors necessary to their business needs or required to be on hand or used by them during any quarterly period would be 283 proof gallons of alcohol, 157 proof gallons of whisky, and 5 gallons of wine. (R. 12–13.) The application was accompanied by an appropriate bond as required by the regulations. The bond and application were approved and in due course a permit was issued by the Federal Prohibition Commissioner with the restriction or limitation, however, that "This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period." (R. 14–15.)

Upon receipt of the permit appellants from time to time made application to the local Prohibition Direc-

tor, under Sections 54 and 55 of the regulations, for permission to purchase alcohol and other distilled spirits. On March 2, 1921, in response to an application for permission to purchase one barrel of grain alcohol, appellants received from the then Prohibition Director a notice that the application was denied for the reason that appellants had already withdrawn for the current quarter a total of 90 gallons and that a permit to purchase a barrel of alcohol would enable appellants to withdraw and use in excess of 100 gallons for the current quarter. (R. 16.) Alleging that the 100 gallons limitation inserted in the permit by the Federal Prohibition Commissioner "is arbitrary, unlawful, unreasonable, and void as constituting an unwarranted usurpation of legislative powers by an administrative officer of the executive department of the Government, and is an attempt by said official to invalidate and repeal those portions of the National Prohibition Act which recognize and permit the lawful use of intoxicating liquor for medicinal and nonbeverage purposes," appellants brought this bill, as above stated, to restrain and enjoin the local Prohibition Director from enforcing as against them such or any restriction upon the amount of spirituous liquors that might be lawfully dispensed by them. (R. 1–11.)

On motion of the defendant the bill was dismissed by the District Court upon the ground that it did not state facts sufficient to constitute a cause of action against the defendant as Acting Prohibition Director in and for the District of California. (R.

20.) On appeal the decree was affirmed by the Circuit Court of Appeals upon the grounds, first, that the Commissioner of Internal Revenue was not made a party to the suit, and, secondly, that the defendant Acting Prohibition Director ceased to be such during its pendency. (R. 51, 53.) A petition for rehearing was denied. (R. 54.)

STATUTE AND REGULATIONS INVOLVED.

The Eighteenth Amendment imposes no prohibition upon the manufacture, sale, or transportation of intoxicating liquor for nonbeverage purposes, nor does it define what shall constitute intoxicating liquor, but Congress in the National Prohibition Act defined the latter and also enacted numerous stringent provisions for giving effect to the Constitutional Amendment and for preventing its evasion. The applicable provisions of the Act and the regulations established pursuant thereto, so far as material here, will be found in an appendix to this brief.

QUESTIONS PRESENTED.

The questions presented are—

(1) Was the Commissioner of Internal Revenue a necessary and indispensable party to the suit?

(2) Did the Federal Prohibition Commissioner have the power to place a restriction or limitation in the permit and prohibit the use by appellants of distilled spirits beyond that limit, and, if not, can appellants restrain appellee from enforcing the same?

(3) Has Congress the power, under the Eighteenth Amendment, to restrict or prohibit the use of spirituous liquors for admittedly nonbeverage purposes?

ARGUMENT.

I.

The Commissioner of Internal Revenue was a necessary and indispensable party to the suit.

The authority for the offices of Federal Prohibition Director and Federal Prohibition Commissioner is derived from Subdivision 7, Section 1 of Title II, of the National Prohibition Act, which provides that any act authorized to be done by the Commissioner of Internal Revenue may be performed by any assistant or agent designated by him for that purpose. Further authority for the office appears in Section 38, which declares that the Commissioner of Internal Revenue and the Attorney General respectively are authorized to appoint and employ such assistants, experts, clerks and other employees, including such executive officers as may be appointed by them to have immediate direction of the enforcement of the provisions of the Act. The regulations issued under the Act define the Director or Federal Prohibition Director as the person having charge of the administration of Federal prohibition in any State (Section 1, Subdivision *e*), and they specify in various places the duties and powers of a Director. Article III of the regulations, while directing that applications under Form 1404 be filed with the Director who is to forward his recommendations thereon to the Commissioner, states that it is solely the Commissioner who issues the permit. The permit, limited as the law authorizes it to be limited, binds all subordinates of the Commissioner, as well as any permittee or other

person. The Director has nothing to do with the issuance of the permit. His sole duty, power or authority is to forward the application with his recommendations.

The regulations (Section 54) further prescribe the procedure to be adopted to secure permits to purchase by persons who have previously made application and received a permit from the Commissioner under the procedure outlined in Article III. These permits are sometimes called "withdrawals." The applications therefor are made on forms known as "1410," and these applications are required to show, among other things, "the number of the permit held by the applicant and the address covered thereby." (Section 55.) And it is further provided in Subdivision (h) of that section, referring to applications on Form 1410, "No application for permits to purchase should be approved by the Director until same has been carefully checked by him with such files and the amounts thereon found to correspond with those *indicated on the previous permit to purchase issued to the applicant.*" This last reference is to the permit previously issued to the applicant by the Commissioner under Article III, on his application 1404, the permit being on Form 1405. Accordingly, by the very regulations which are by statute made a part of the Act, the powers of the Director are expressly limited and prescribed and the withdrawals he is authorized to issue necessarily rest upon unexpired permits previously issued by the Commissioner. The Director would have no power to issue any permit of

any kind under 1410 or any other provision of the law unless it were authorized to be issued by the terms of the previous permit issued by the Commissioner under Article III.

Thus the Director is a mere agent or subordinate of the Commissioner and has no power except such as he derives from the latter, and in the exercise of his power he is expressly limited by the act of the Commissioner himself in issuing the original permit. And if a court of equity should require him to ignore the limits or conditions of his own authority, it would not be a case where he would have a plain statutory duty to perform, and hence a court of equity would not coerce him in the exercise thereof.

The situation with reference to the Director being a mere subordinate of the Commissioner with a limited power is analogous to that of a ministerial officer acting in obedience to process or orders issued by tribunals or officers invested by law with authority to pass upon facts and make an order thereon. That the subordinate in such case would have no jurisdiction or discretion to depart from the direction of a superior is well settled.

Erskine v. *Hohnbach*, 81 U. S. 613;
Haffin v. *Mason*, 82 U. S. 671;
Harding v. *Woodcock*, 137 U. S. 43.

The case first above cited was an action for damages against a collector of internal revenue for the alleged wrongful seizure of certain property in the enforcement of an assessment against the plaintiff made by the assessor of the district and certified to the collector

with an order directing its collection. In affirming a judgment for the collector this court said (pp. 616–617):

> The collector could not revise nor refuse to enforce the assessment regularly made by the assessor in the exercise of the latter's jurisdiction. The duties of the collector in the enforcement of the tax assessed were purely ministerial. The assessment, duly certified to him, was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constituted his protection.
>
> Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or *orders* issued to them by tribunals or *officers* invested by law with authority to pass upon and determine *particular facts*, and render judgment thereon, it is well settled now, that if the officer or tribunal possess jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the *order* or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been com-

> mitted by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued. (Italics ours.)

The rule that an action of this character does not lie against a subordinate officer when the principal officer is not joined is well exemplified in the case of *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28. In that case a bill was filed seeking a mandatory injunction against the Secretary of the Interior and the Commissioner of the General Land Office. A demurrer to the bill was sustained and a decree rendered for the defendant, which was affirmed by the Court of Appeals for the District of Columbia, and an appeal taken to this court. Pending the appeal the Secretary resigned his office. Thereupon this court reasoned that owing to the character of the action he had ceased to be a party and his successor could not properly be substituted, thus leaving the action against the Commissioner alone. With that situation in mind, this court said (pp. 34–35):

> The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties (2d ed.), bk. 3, c. 13.

> This is well exemplified by a decision of Lord Chancellor Hardwicke. Under acts of Parliament, appointing commissioners to build fifty new churches, appropriating money to support the ministers, and providing that the moneys appropriated should be paid to a treasurer, not one of the commissioners, but appointed by the Crown, and should be by him disbursed and applied according to orders of the commissioners, Lord Hardwicke held that a bill by a minister of one of the churches to recover his stipend, and to have a fund in the treasurer's hands invested as required by the acts, could not be maintained against the treasurer alone, without joining any of the commissioners; and said: "This is one of tne most extraordinary bills I ever remember; and there is no foundation for relief, either in law or equity. It is brought against Mr. Blackerby, who is nothing but an officer under the commissioners for building the fifty new churches. It would be absurd if a bill should lie against a person who is only an officer and subordinate to others, and has no directory power." "I should think the commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make a person who acts ministerially the sole party." *Vernon* v. *Blackerby*, 2 Atk. 144, 146; S. C., Barnardiston Ch. 377.

The point is made in the opinion (p. 33) that the Commissioner was to perform executive duties *under the direction of* the Secretary. Other like provisions of law were referred to, wherefore it was considered

that the Commissioner was a mere subordinate of the Secretary.

We have here a much stronger case for the application of the same doctrine. Under the provisions of Subdivision 7, Section 1, and Section 38, Title II, of the National Prohibition Act, the Director's office is a mere creation of the Commissioner of Internal Revenue and the duties the former is directed to perform render him entirely subordinate to the latter.

It is clear that appellants sought to secure all the benefits of an equitable review of the action of the Commissioner without bringing a suit against the Commissioner, but have sought instead to sue a subordinate agent having no discretion in the premises, and a decree against whom would in no respect bind the Commissioner. Such a decree would be futile and would afford appellants no immunity for their violations of the Commissioner's permit.

If appellants felt aggrieved by the action of the Commissioner they had a right of review in a court of equity as provided in Sections 5 and 6, Title II, of the Act, but they could not have the findings of the Commissioner reviewed by proceeding against the Director without making the Commissioner a party defendant. The Commissioner was a necessary party because it was his action which it was sought to control. Under the statute and regulations he requires applications for permits and the necessary bonds to be filed. These he reviews as well as the Director's recommendations thereon, and finally he grants the permits. In any suit affecting his duties,

judgment, or discretion in these matters he necessarily must be made a party defendant. He was an indispensable party because without him the court could not proceed to a complete and final decree. An injunction issued solely against the Director could readily be avoided by the Commissioner appointing a new Director. A decree, therefore, running against the Director alone is not a complete and final decree. *Shields* v. *Barrow*, 17 How. 129; *United States* v. *Bean*, 253 Fed. 1.

The court below, therefore, did not err in affirming the decree because the Commissioner of Internal Revenue was not made a party to the suit.

II.

Power of the Federal Prohibition Commissioner to fix the limits of a permit.

Permits are issued under the National Prohibition Act and the regulations made pursuant thereto by the Federal Prohibition Commissioner as the agent or subordinate of the Commissioner of Internal Revenue. Title II, Sec. 1, Subdivision 7; Secs. 38, 6. Section 6 provides that "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner [of Internal Revenue] so to do," with exceptions not material here. It also is stated "permits to purchase liquor shall *specify* the *quantity* and kind to be purchased and the purpose for which it is to be used." Further, "Every permit shall be in writing, dated when issued, and signed by the Commis-

sioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall *designate* and *limit* the acts that are permitted and the time when and place where such acts may be performed." Also, "The Commissioner may prescribe the form of all permits and applications and the facts to be set forth therein." And also, "Before any permit is granted, the Commissioner may require a bond in *such form and amount as he may prescribe* to insure compliance with the terms of the permit and the provisions of this Title." (Italics ours.)

The Act in Subdivision 7, Section 1, Title II, also provides, "The term 'regulation' shall mean any regulation prescribed by the Commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the Commissioner is authorized to make such regulations."

Acting under this power, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on January 16, 1920, issued regulations known as "Regulations 60." Article III of these regulations provides for the application for and issuance of the above-mentioned permits and specifies in detail the amounts and the procedure to be adopted. It is there provided that an application for a permit according to Form 1404 should be made setting forth the data required by the regulations, which applications are to be sent to the Director, and except for applications for permits to transport or prescribe, the Director is to forward the applications

to the Commissioner. It is then provided (Section 9) that "after examining the application and data forwarded therewith the Commissioner, after noting his approval or disapproval on each copy of the application, will return one copy to the Director and forward one copy to the applicant. If the application or *any part thereof* is approved by the Commissioner, it will be given a proper serial number and the Commissioner will issue a permit in triplicate on the appropriate Form 1405 *for the act or acts approved*, noting such serial number on each copy thereof. One copy of the permit will be forwarded to the Director and one copy to the applicant. The original copy of the application and one copy of the permit will be filed by the Commissioner." (Italics ours.) It also is provided that before forwarding the application on Form 1404, the Director will examine carefully the qualifications of the applicant and note his approval or disapproval on each copy and forward all three copies to the Commissioner, setting forth any special circumstances that may exist. But it is the Commissioner who decides upon issuing the permit and finally issues the same.

It is further stated (Section 15) that "Every permit will clearly and specifically *designate* and *limit* the acts that are permitted and the time when and the place where such acts may be permitted."

The permit in question conformed to these provisions. It was issued on the blank known as Form 1405, authorizing appellants to sell and use intoxicating liquor under certain conditions, and in which permit the Commissioner did "specify the quantity

and kind to be purchased and the purpose for which it is to be used," to wit, certain nonbeverage purposes. The permit also *designated* and *limited* the acts that were permitted thereunder and the time and place when and where they were to be performed, to wit, the applicants were limited to 100 gallons of distilled spirits and 5 gallons of wine per quarterly period, the permit to be effective until December 31, 1921, unless revoked, and to be used at No. 27 Stockton Street, San Francisco. (R. 14.)

The same regulations provide (Section 20 et seq.) for bonds. The amount of the penalty of the bond, in order to permit its preparation in advance, is in practice based upon the amount stated in the application. In case the application is not granted for the full amount, since the greater includes the less, the tendered bond may be allowed to stand, although in strictness the penalty of the bond need be no more than an amount fixed with reference to the liquors "manufactured or received" during a quarterly period, not less, however, than $1,000 nor more than $100,000 (Subdivision (a), Section 20). The amount of the bond, therefore, is not significant of the amount for which the permit should issue.

It thus appears that both by the National Prohibition Act and by the regulations issued thereunder the Commissioner has the discretion to limit the liquor that may be purchased or used to such amount as he deems proper. A contrary construction which would require the Commissioner to issue a permit for whatever amount of liquor an applicant might

request, or for whatever amount he might be willing to tender a bond, would give rise to grave abuse. Indeed, it would greatly impair the efficiency of the law. So, from the necessity of the case, as well as from the express provisions of the Act and the regulations, the Commissioner is authorized, required, and commanded to state in the permit when it is issued the amount or *limit* of liquors that may be procured thereunder.

The discretion to determine the amount or limit of a permit must be placed somewhere. Obviously it can not be left with the applicant, as appellants contend, to depend on the mere statement of his business needs or the amount of bond he is willing to tender. Congress placed it with the Commissioner. To accomplish this a more specific or mandatory direction than is contained in the foregoing provisions of the Act was not necessary. Authority was conferred on the Commissioner to prescribe regulations for carrying out the provisions of the Act. The regulations so prescribed authorize the Commissioner, as above indicated, to approve all or any part of an application and to designate and limit the acts to be performed under a permit. Of such a situation, this court, in *United States* v. *Birdsall*, 233 U. S. 223, 235, said:

> It is not enough to say that there is no mandatory requirement imposing the obligation to give the recommendation. In executing the powers of the * * * office there is necessarily a wide range for administrative discretion and in determining the scope of official action regard must be had to the authority conferred; and this, as

> we have seen, embraces every action which may properly constitute an aid in the enforcement of the law.

The Commissioner having authority to exercise his discretion in the performance of his duties, the case is one where primarily a court of equity would not have power to restrain his acts or to coerce him in the performance thereof by mandatory injunction or otherwise. It would not control him in the exercise of his judgment or discretion. His acts would not be purely ministerial. This conclusion is plainly stated in one of the cases cited by appellants, to wit, *Noble* v. *Union River L. R. Co.*, 147 U. S. 165. There the general rule is declared and the decisions reviewed show a distinction between a case involving the exercise of judgment and that of performing acts purely ministerial, and the principle here contended for is expressly conceded. Accordingly, *in the absence of special provision*, a court of equity would have no authority to control the discretion of the Commissioner in issuing permits on Form 1405 or in limiting the acts to be performed thereunder.

III.

An adequate remedy is provided by the statute for any improper exercise of Commissioner's discretion.

The statute expressly provides a remedy for the possible unlawful exercise of power by the Commissioner in refusing to grant a permit. Section 6, Title II, declares:

> In the event of the refusal by the Commissioner of any application for a permit, the

> applicant may have a review of his decision before a court of equity in the manner provided for in Section 5 hereof.

Similar provision is made respecting the revocation of a permit. Section 5 referred to provides:

> The manufacturer may by appropriate proceeding in a court of equity have the *action* of the *commissioner* reviewed, and the court may affirm, *modify*, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article. [Italics ours.]

It is submitted that this remedy is in all respects adequate to afford full relief to the applicant as against any unlawful act of the Commissioner in refusing to issue the permit as applied for, that is, in improperly limiting the acts to be performed or in inserting unjust conditions in the permit. In a suit to review the action of the Commissioner in revoking a permit, it is provided that during the pendency of the action the permit shall be temporarily revoked. No corresponding provision, however, obtains with respect to a suit to review the act of the Commissioner in refusing a permit; this for the evident reason that a court could not issue a temporary permit during the trial, that power residing solely in the Commissioner.

Accordingly, we submit that the case is governed by the well-established rule that where the action of an officer is a matter of discretion, either as to the

manner of its exercise or as to the extent to which it will be exercised, a court of equity will not control such discretion by a mandatory or other injunction or by a writ of mandamus. This general rule governs the instant case to the full extent of the principle, except that effect must be given to the above-specified saving clauses, whereby any applicant who conceives himself injured by the particular action of the Commissioner may begin his suit in equity to review such action. It will be noted that in such a suit the court not only may affirm or reverse the Commissioner's findings, but may *modify them*. This latter element of the power of the court would indicate that it was contemplated that the remedy provided should be sought in the contingency we have here, namely, where the application is granted in part. And, as we have seen, the Commissioner has power to grant it in part. If the remedy were limited to the case of a total refusal of a permit, there would be nothing for the court to do but to *reverse* the action, if the facts called for such decision. There would be nothing to modify.

It is submitted appellants should have commenced their suit in equity against the Commissioner to review the action complained of. Failing this, his action is a finality and binds all subordinates, officials, and agents acting under him, and any suit against them to control his action must fail.

IV.

Congress has power, under the Eighteenth Amendment, to restrict the use of spirituous liquors for nonbeverage purposes.

Appellants contend the Eighteenth Amendment does not authorize Congress to limit, restrict, or prohibit the use of spirituous liquors for purposes other than beverage purposes, inasmuch as said Amendment is a grant of power and Congress has no right to enlarge the grant by legislation; that the regulation of the practice of medicine and of pharmacy is a matter within the domain of the powers reserved to the States, no part of which has been granted to the Federal Government by the Eighteenth Amendment.

The Eighteenth Amendment, however, prohibited the traffic in intoxicating liquors for beverage purposes and gave Congress power to enforce this prohibition by appropriate legislation. "Appropriate legislation" means such legislation as will tend to make this constitutional provision completely effective; that is, legislation which will give full force and effect to the constitutional inhibition against the traffic in intoxicating liquor. The duty of enforcing this prohibition carries with it full power to do all things necessary for its accomplishment. *Ex Parte Virginia*, 100 U. S. 339. Accordingly, Congress enacted the National Prohibition Act, entitled "An Act to prohibit intoxicating beverages, and to *regulate* the manufacture, production, use, and sale of high-proof spirits for other

than beverage purposes," etc., which Act provides, among other things, that all its provisions shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented (Sec. 3, Title II); authorizes the Commissioner of Internal Revenue to establish regulations for its effective enforcement, and contains numerous other stringent provisions to prevent its evasion.

Congress has been given express power to enact legislation to prohibit the use of intoxicating liquor for beverage purposes, and this power carries with it the incidental power to enact such laws and provide for such regulations as will effectively prevent the traffic in intoxicating liquor for the prohibited purposes.

> *McCulloch* v. *Maryland*, 4 Wheat. 315;
> *Purity Extract Co.* v. *Lynch*, 226 U. S. 192;
> *Hoke* v. *United States*, 227 U. S. 308;
> *Ruppert* v. *Caffey*, 251 U. S. 264.

Appellants concede that in order to prevent the use for beverage purposes Congress may provide for reasonable regulations respecting the use of intoxicating liquor for medicinal and sacramental purposes, but contend that the use for the latter purposes may not be restricted or prohibited. Every form of regulation implies a partial prohibition. Regulation means the prohibition of something and the extent of the prohibition is a matter for the determination of Congress, provided only that it stays within the limits of constitutional power. In determining whether legislation may under some circumstances properly take the

form or have the effect of prohibition, the nature of the evil sought to be suppressed must be taken into consideration. *Lottery Case*, 188 U. S. 321, 355, 359. The exceptional nature of the subject treated was the justification for the action of Congress. *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, 332. It was competent for Congress to recognize the difficulties always besetting the administration of laws aimed at the prevention of traffic in intoxicants. It is well known that the unrestrained traffic in liquor for alleged medicinal purposes results in great abuses and serves as a ready means of defeating the constitutional prohibition.

Congress was not restricted to mere regulation if the end sought could not be accomplished except by partial prohibition. To prevent the beverage use many States found it necessary to prohibit the medicinal use. The Eighteenth Amendment was designed to prevent the same evil and, it is submitted, vested Congress with the same legislative discretion. If Congress can not effectively enforce the provisions of the Amendment except by the exercise of a police power similar to that exercised by the States, it is well settled that it may exert such power. *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146. The power of a State in the enforcement of its prohibition laws to prohibit the manufacture and sale of liquors for medicinal purposes has been sustained by the highest courts of the States and by this court.

The Government need not, however, argue this point *in extenso* in this brief, for two substantial reasons:

1. The reasons suggested under Points I, II, and III would seem to be conclusive.

2. The question of power, under the Eighteenth Amendment, has already been discussed by the Government in its briefs filed in the case of *James Everard's Breweries* v. *Day, Prohibition Director, and others* (No. 200 of this Term).

If further argument be necessary on our Point IV, we venture, in view of the fact that the *Everard case* will be argued shortly before the instant case, to remind the Court of both the printed briefs and oral argument in that case.

The Eighteenth Amendment clearly indicates that the scope of the prohibition and the details of its enforcement were to be left to Congress. In a sense, the Eighteenth Amendment does not act *in personam*. It does not say that a man may not drink intoxicating liquors. In a sense, it does not act even *in rem*; for it does not act *directly* upon the contraband merchandise. Its inhibition is directed to the processes of manufacture and transportation of the outlawed merchandise. Undoubtedly its purpose was to stop the habit of drinking intoxicating liquors in the United States, and it sought to accomplish this by cutting off the base of supplies. What was forbidden was the manufacture and transportation of intoxicating liquors for beverage purposes; but not only was the method of enforcement left to Congress, but

even the definition of "intoxicating liquors" and of "beverage purposes" was not provided by the Constitution itself. The details of definition and enforcement were left primarily to Congress, under the second clause, and, ultimately, to the judiciary, for fair interpretation.

The Amendment as proposed to the States was not a new expedient. Before Congress took this action, the subject had been discussed for several generations and had resulted, in the States, in many Constitutional provisions and statutory laws. Upon these was built a very considerable body of judicial construction.

Prior to the submission to the States of the Eighteenth Amendment, there were already in the Constitutions of at least seventeen States a prohibition of intoxicating liquors. Some of these, simply prohibited intoxicating liquors, without any exception in favor of such permitted use for medicinal purposes. The Constitutions of other States, as, for example, Kansas, contained an express exception in favor of the manufacture and sale of intoxicating liquors for medical, scientific, and mechanical purposes.

In nearly all the instances, with few exceptions, the Legislatures of the various States, in enforcing the Constitutional prohibition, were given a wide discretion to determine under what conditions and for what purposes the use of intoxicating liquors should be permitted. Thus, in twelve States (Arizona, Utah, Maine, New Mexico, North Dakota, Georgia, Kansas, Nebraska, North Carolina, Idaho, Washington, and

West Virginia), no intoxicating liquors of any kind might be prescribed under the enforcing legislation; while in eleven States (Alabama, Arkansas, Delaware, Florida, Indiana, Mississippi, Oklahoma, Oregon, South Carolina, Tennessee, and Texas) pure alcohol only could be prescribed.

While some of this legislation was subsequent to the Federal Prohibition Amendment, yet most of it antedated it. These Constitutional provisions and statutory laws had given rise to a great many decisions, some of which had reached this Court under the Fourteenth Amendment, and it had been uniformly held, both by the highest Courts of the States and this Court, that the power to regulate intoxicating liquors not only carried with it the power to proscribe intoxicating liquors, but, when necessary, liquors which were similar in appearance to intoxicating liquors, but, in fact, not intoxicating at all.

Purity Extract Co. v. *Lynch*, 226 U. S. 192.
Ruppert v. *Caffey*, 251 U. S. 264.

In the latter case, the Court will find, in the elaborate footnotes to the exhaustive opinion of Mr. Justice Brandeis, references to many of these Constitutional provisions and statutory laws.

All this body of Constitutional and statutory law and judicial decisions thereon was unquestionably before Congress when it drafted the Eighteenth Amendment. It was not building the foundations of a new public policy; it was only erecting a superstructure thereon.

Inasmuch as concurrent power of both State and Nation was clearly contemplated, it is a fair assumption that the Eighteenth Amendment was intended to harmonize with the general policy of the States, which experience had proved to be effectual in suppressing the liquor traffic. Moreover, the form and structure of the Eighteenth Amendment were to be in harmony with the Constitution in stating general principles, but leaving the details to legislative discretion. For example, the Amendment does not suggest any definition of intoxicating liquors, and even experts might disagree as to what is, in a given case, an intoxicating liquor. Therefore, the second clause empowered Congress in enforcing the general policy of prohibition to determine what was an intoxicating liquor.

Possibly the late Chief Justice White had this theory in mind when, in his concurring opinion in the *National Prohibition Cases* (253 U. S. 350, 390), he said:

> In the first place it is indisputable, as I have stated, that the first section imposes a *general* prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such

> regulations and sanctions as were essential to make it operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. [Italics mine.]

This does not mean that Congress has any unlimited discretion in the matter. It can not create, by statutory law, an exception which would defeat the "general" policy of prohibition; but, in harmony with the legislation of the States, with which the Amendment proposed to work in cooperation to suppress a great evil, Congress, to whom the duty was committed of providing enforcing statutes, was empowered to say *within reasonable limits*, under what circumstances and for what special purposes intoxicating liquors could be manufactured or transported, even in a beverage form for purposes which had not generally been regarded as within the evil which the Amendment sought to destroy.

If this view be sound, then the power of Congress to determine amounts of intoxicating liquors a druggist could be permitted to have, and its power to vest in the Treasury Department, and especially in the Commissioner of Internal Revenue, the determination of the question of the quantity of liquor that any pharmacist or physician might have or prescribe for a special purpose permitted by the law is clear.

Even if this interpretation of the Eighteenth Amendment is not correct, the fact remains that, even though the Eighteenth Amendment may not forbid the use of intoxicating liquors for medicinal purposes, yet, if Congress reaches the conclusion that, in enforcing the policy of prohibition, it is necessary to forbid otherwise legitimate uses of "nonbeverage liquors," its power is equally beyond dispute. (See *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.) If, as in the case last cited, a State, in enforcing its laws against intoxicating liquors, may forbid the use of a liquor which is, in fact, not intoxicating, then, *a fortiori*, it can forbid an otherwise legitimate use of intoxicating liquors, if such inhibition is necessary to prevent the traffic in such liquors for so-called "beverage" purposes.

JAMES M. BECK,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
MAHLON D. KIEFER,
Assistant Attorney.

MARCH, 1924.

APPENDIX.

STATUTE.

Section 1, Title II, of the National Prohibition Act (Chap. 85, 41 Stat. 305), defines the meaning of the words "person," "commissioner," "application," "permit," and "bond," as used therein. The word "commissioner" shall mean Commissioner of Internal Revenue. The term "permit" is defined to mean a formal written authorization by the Commissioner *setting forth specifically* therein the things that are authorized. Subsection 7 of this section declares:

> The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations.
>
> Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records.

Section 4 enumerates various articles therein declared not subject to the provisions of the Act if they correspond with certain specified descriptions and limitations, in which event the Commissioner is authorized to issue a permit for their sale. By Section 5, however, it is provided that whenever the Commissioner has reason to believe that any of such articles do not correspond with the descriptions and limitations specified in Section 4, he shall make an investigation upon prescribed notice, and in the

event that the manufacturer of such an article fails to show to his satisfaction that the article corresponds to the descriptions and limitations provided in Section 4, his permit shall be revoked.

Section 5 concludes with the provision that—

> The manufacturer may by appropriate proceeding in a court of equity have the *action* of the *commissioner* reviewed, and the court may affirm, *modify*, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article.

By Section 6 it is declared, among other things, that no one shall manufacture, sell, purchase, transport, or prescribe any liquor *without first obtaining a permit from the Commissioner* so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as therein provided. The life of such permits is prescribed, and it is declared that they shall *specify* the *quantity* and kind of liquor to be purchased, and the purpose for which it is to be used, power being given the Commissioner to prescribe the form of all such permits and of the applications therefor, and to require bond in such form and amount as he may prescribe, and further, as follows:

> No permit shall be issued to any one to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. * * * Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and

address of the person to whom it is issued and shall *designate and limit the acts that are permitted* and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

And Section 6 contains this further provision:

In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in Section 5 hereof.

Section 38 authorizes the Commissioner of Internal Revenue and the Attorney General to appoint and employ such assistants, experts, clerks and other employees, including such executive officers as they may deem necessary for the enforcement of the provisions of the Act.

[Italics ours.]

REGULATIONS.

Regulations 60 of the Bureau of Internal Revenue, relative to the manufacture, sale, etc., of intoxicating liquor, declare, Section 1, Article I, that the word "Commissioner" when used in the regulations shall mean the Federal Prohibition Commissioner, and the word "Director" or the phrase "Federal Prohibition Director" shall mean the person having charge of the administration of Federal prohibition in any State.

Section 2, Article II, declares:

On and after January 17, 1920, the kinds of intoxicating liquors enumerated below may be manufactured, sold, bartered, transported, imported, exported, delivered, furnished, pur-

> chased, possessed, and used for nonbeverage purposes as indicated below, but only under the conditions and requirements hereinafter provided.

And then follows a list of intoxicating liquors and the purposes for which they may be used by pharmacists and others.

Section 4 provides:

> On and after January 17, 1920, intoxicating liquor may not be manufactured, sold, bartered, transported, imported, exported, delivered, furnished, purchased, possessed, or used for any other purposes or by any other persons than specifically authorized herein, except for such nonbeverage purposes for which the commissioner may in his discretion issue permits.

Section 6, Article III, declares that all persons, with exceptions not material here, "desiring to manufacture, sell, barter, transport, import, export, deliver, furnish, prescribe, purchase, possess or use intoxicating liquor for the nonbeverage purposes herein authorized must procure permits therefor in the manner hereinafter prescribed."

Section 8 is as follows:

> Persons desiring to procure any permit required by these regulations, other than permits to purchase, must submit application for permit, form 1404, in triplicate, clearly setting forth all the data required by the regulations dealing with the particular class or classes into which they fall. Form 1404, supplemental, must be attached in case of application for permit to use intoxicating liquor in the manufacture of certain preparations as provided in Article XI. All three copies must be signed by the applicant, the

original being sworn to before a person authorized to administer oaths. All three copies must then be forwarded to the Director of the State in which the place of business of the applicant is located.

(*a*) After application is filed for permit to transport or prescribe intoxicating liquor, the Director is authorized to issue permit to the applicant, if, after examination of the qualifications of such applicant, he believes that such permit should be granted. Such permits will be issued in triplicate on appropriate form 1405, and a serial number noted on each copy of the permit and application. The Director will also note on each copy of the application his approval thereof. The original copy of the application and one copy of the permit will then be forwarded to the Commissioner, and one copy of each will be forwarded to the applicant, the remaining copy of each to be retained in the files of the Director.

(*b*) In any case where the Director is in doubt concerning the propriety of issuing a permit to transport or prescribe he will forward the original copy of the application to the Commissioner with a statement of the facts, and the Commissioner will return said original application with instructions as to the proper action to be taken.

(*c*) In all cases where the application for permit is denied a copy of such application will be returned to the applicant with the Director's disapproval noted thereon. The original copy will be forwarded to the Commissioner with a statement of the Director's reason for disapproval, except in cases where such statement already is on file with the Commissioner. The other copy, with proper notation thereon, should be retained in the Director's files.

Section 9 provides:

> Where application is filed for any other permit required by these regulations, the Director, after carefully examining the qualifications of the applicant, will note his approval or disapproval in the appropriate space on each copy of the application and will forward all three copies to the Commissioner, and if any special circumstances exist will attach to the application and transmit to the Commissioner therewith a letter fully setting forth such circumstances. After examining the application and data forwarded therewith the Commissioner, after noting his approval or disapproval on each copy of the application, will return one copy to the Director and forward one copy to the applicant. If the application or *any part thereof* is approved by the Commissioner, it will be given a proper serial number and the Commissioner will issue a permit in triplicate on the appropriate Form 1405 for the act or acts approved, noting such serial number on each copy thereof. One copy of the permit will be forwarded to the Director and one copy to the applicant. The original copy of the application and one copy of the permit will be filed by the Commissioner.

Section 15 provides:

> Every permit will clearly and *specifically designate and limit the acts that are permitted* and the time when and the place where such acts may be permitted. * * * Any such permit may be revoked in whole or in part by the commissioner at any time, if it appears after proper hearing that the terms thereof have not been complied with. In the event of refusal by the commissioner to grant or renew a permit, or if any permit is revoked,

> the applicant or permittee may have the action of the commissioner reviewed by appropriate proceedings in a court of equity.

Section 20 declares that all persons desiring to obtain permits provided by the regulations, with exceptions not applicable here, must at or before the time of filing application therefor file with the Director a bond of a designated penal sum in duplicate on Form 1408 or Form 1409 to insure compliance with the provisions of the Act and the regulations, as well as to cover any taxes and penalties which may be imposed under the internal-revenue laws.

Section 22 provides:

> Whenever the quantity of intoxicating liquor or other preparations debited against the bond is such that the existing penal sum is not sufficient a new bond must be furnished in sufficient sum to cover all liability.

Section 54, Article VIII, relating to the procedure for procurement and delivery of intoxicating liquor by persons holding permits, declares that any person entitled to procure such liquor under the regulations must secure a permit to purchase on Form 1410 from the Director, and Section 55 prescribes:

> The applicant must describe the intoxicating liquor to be received by him with as much particularity as possible. He must give in all cases the quantity in wine gallons of each kind of intoxicating liquor on hand on the date of application, and previously received by him during the current calendar year. Each application must also show the name and address of the vendor, the purpose for which such intoxicating liquor is to be used, the number of the permit held by the applicant, and the address covered thereby.

(a) The applicant must assure himself that the quantity of intoxicating liquor outstanding as a debit against his bond, together with the additional quantity applied for, is not in the aggregate greater than the quantity covered by the penal sum of the bond.

Section 55 (h) provides:

Directors will keep a file of copies of permits to purchase, Form 1410, that have been returned by vendors. These forms must be filed chronologically and all forms issued to any one permit holder must be kept separate. This file should be kept up to date at all times. No application for permits to purchase should be approved by the Director until same has been carefully checked by him with such files, and the amounts thereon found to correspond with those indicated on the previous permit to purchase issued to the applicant.

[Italics ours.]

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GNERICH ET AL., COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF B. & S. DRUG COMPANY *v.* RUTTER, AS PROHIBITION DIRECTOR IN AND FOR THE DISTRICT OF CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 79. Argued March 10, 1924.—Decided June 2, 1924.

1. The "Prohibition Commissioner" and "Prohibition Directors", are no more than mere agents and subordinates of the Commissioner of Internal Revenue, provided for and designated under regulations adopted by him pursuant to the National Prohibition Act. P. 391.
2. Pharmacists sued to restrain a local prohibition director from refusing them permits to buy liquors to be dispensed for nonbeverage purposes in excess of a limit fixed in their permit to sell as issued by the Prohibition Commissioner, the plaintiffs denying the legality of the restriction even if authorized by regulations of the Commissioner of Internal Revenue. *Held*, that the Commissioner of Internal Revenue was a necessary party. *Id.*
3. A bill which is defective for want of a necessary party should be dismissed on that ground, and not upon the merits. P. 393.

277 Fed. 632, reversed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a bill brought to restrain a "prohibition director" from giving effect to a restriction contained in the plaintiffs' permit to sell intoxicating liquors.

Mr. Harry G. McKannay, with whom *Mr. Louis V. Crowley* was on the brief, for appellants.

The Commissioner of Internal Revenue was not a necessary party.

The "Prohibition Commissioner" is a creature of the regulations, published by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. Being a creature of the regulations, he had only

such powers as are specifically granted to him therein. The law or the regulations do not grant that officer any discretion to insert the restrictions in appellants' permit of which we complain. The regulations are the mode and the measure of his power, and unless they authorize him, in his official capacity, to determine the amount of liquor that can lawfully be used and dispensed by the appellants, then such an attempted limitation and prohibition was his personal action, without official sanction and as void as if it had been inserted in the permit as a prank or a joke by a total stranger.

The Circuit Court of Appeals expressed in its opinion the view that it is "the very purpose of this action to control the action of the Commissioner of Internal Revenue." This we submit is error, inasmuch as we are unable to attribute to that official responsibility for any of the acts of which we complain, and we know of no conduct on his part that in any manner infringes upon our rights, unless it be held that the acts of the National Prohibition Commissioner and the appellee are consistent with and authorized by the language and provisions of the regulations published by the Commissioner of Internal Revenue.

Furthermore, assuming, as we contend, that Congress had no power to place in the National Prohibition Act the restrictions and prohibitions set forth therein against the practice of medicine and pharmacy, then the enforcement of those restrictions can be enjoined as against any public officer attempting to enforce them.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Mahlon D. Kiefer* were on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a suit for an injunction against the federal prohibition director for California restraining him from giv-

ing effect to a particular restriction embodied in a permit, issued under the National Prohibition Act, authorizing the plaintiffs, who are licensed pharmacists conducting a general drug business in San Francisco, to use and sell in such business intoxicating liquors for other than beverage purposes. The District Court dismissed the bill as not stating a cause of action, and the Circuit Court of Appeals affirmed the decree on the ground that the suit could not be maintained without making the Commissioner of Internal Revenue a party defendant. 277 Fed. 632. The plaintiffs prosecute this appeal.

The National Prohibition Act, c. 85, Title II, 41 Stat. 307, commits its administration to the Commissioner of Internal Revenue; authorizes him to prescribe regulations for carrying out its provisions, and declares, in clause 7 of § 1, that any act authorized to be done by the commissioner "may be performed by any assistant or agent designated by him for the purpose."

The act directly prohibits the manufacture, sale, etc. of intoxicating liquors for beverage purposes, and further provides, in § 3, that liquor for nonbeverage purposes may be manufactured, purchased, sold, etc., "but only as herein provided," and, in § 6, that no one shall manufacture, sell, purchase, etc., any liquor "without first obtaining a permit from the commissioner so to do"; that no permit shall be issued to anyone to sell at retail, unless the selling is to be through a pharmacist designated in the permit and licensed under the state law to compound and dispense medicine under a physician's prescription; that every permit shall be "signed by the commissioner or his authorized agent" and shall "designate and limit the acts that are permitted"; that the commissioner "shall prescribe the form of all permits", and that where he refuses a permit the applicant "may have a review of his decision before a court of equity."

The regulations prescribed provide for and designate a general agent of the Commissioner of Internal Revenue, called a prohibition commissioner, who is authorized, among other things, to issue and sign permits to sell liquor at retail for medicinal purposes through licensed pharmacists, and also a local agent in each State or district, called a prohibition director, who is authorized, among other things, to issue and sign permits to purchase liquor to be used and sold under the permits last mentioned. The regulations further contain a provision that "Every permit will clearly and specifically designate and limit the acts that are permitted and the time when and the place where such acts may be performed."

The permit held by the plaintiffs was issued and signed by the prohibition commissioner; and the restriction therein of which the plaintiffs complain says, "This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period." The director adhered to the restriction by refusing to give the plaintiffs permits to purchase in excess of those quantities. The plaintiffs allege that the restriction was put in the permit without any lawful authority; that, if it be authorized by the regulations, the latter are void, and that the director by giving effect to it is wrongfully subjecting the plaintiffs to irreparable injury.

The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given

opportunity to defend his direction and regulations. *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578; *Plested* v. *Abbey*, 228 U. S. 42, 50–51. In principle, *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, is well in point. There an injunction was sought against the Secretary of the Interior and the Commissioner of the General Land Office to prevent them from giving effect to prior orders of the Secretary alleged to be outside his powers and hurtful to the plaintiff. While the suit was pending the Secretary resigned his office and there was at that time no way of bringing his successor into the suit. So, the question arose whether it could be continued against the Commissioner alone. The answer was in the negative, the Court saying, p. 34:

"The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties, (2d ed.) bk. 3, c. 13.

"This is well exemplified by a decision of Lord Chancellor Hardwicke. Under acts of Parliament, appointing commissioners to build fifty new churches, appropriating money to support the ministers, and providing that the moneys appropriated should be paid to a treasurer, not one of the commissioners, but appointed by the Crown, and should be by him disbursed and applied according to orders of the commissioners, Lord Hardwicke held that a bill by a minister of one of the churches to recover his stipend, and to have a fund in the treasurer's hands invested as required by the acts, could not be maintained against the treasurer alone, without joining any of the

commissioners; and said: 'This is one of the most extraordinary bills I ever remember; and there is no foundation for relief, either in law or equity. It is brought against Mr. Blackerby, who is nothing but an officer under the commissioners for building the fifty new churches. It would be absurd if a bill should lie against a person who is only an officer and subordinate to others, and has no directory power.' 'I should think the commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make a person who acts ministerially the sole party.' *Vernon* v. *Blackerby*, 2 Atk. 144, 146; *S. C.*, Barnardiston Ch. 377."

We agree with the Circuit Court of Appeals that the Commissioner of Internal Revenue was a party without whose presence the suit could not be maintained; but the decree of the District Court should not have been affirmed. The decree was on the merits, and, as it was given in the absence of a necessary party, it should not have been permitted to stand.

On the record as brought here it is not certain that the amount requisite to give the District Court jurisdiction was involved, but that question becomes immaterial in view of the conclusion reached on the other point.

Decree reversed with directions to dismiss the bill for want of a necessary party.